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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-156

CECIL HICKS, District Attorney of the County of Orange, State of California, *et al.*,

Appellants,

vs.

VINCENT MIRANDA, *et al.*,

Appellees.

On Appeal From the United States District Court for the Central District of California.

APPELLEES' BRIEF.

Jurisdiction.

Appellees contend htat the appeal herein is not within the jurisdiction of this Court under 28 U.S.C. §1253, but that such appeal lies only to the Court of Appeals. A full discussion of this contention appears in point II of the Argument, *infra.*

Questions Presented.

1. Whether the District Court had jurisdiction to enter the amendment to judgment on September 30, 1974, for the reason that timely motions under F.R. Civ.P. Rule 59(e) were pending prior to the filing of

the notices of appeal from the judgment entered June 4, 1974; and whether the premature notices of appeal may be treated as though they had been taken from the judgment as amended on September 30, 1974.

2. Whether the appeal herein is not within the jurisdiction of this Court because the District Court's judgment, as amended, grants only declaratory relief respecting the constitutionality of state statutes and, although an injunction also is granted, the injunction does not restrain the action of any state officer by restraining the enforcement, operation or execution of any state statute.

3. Whether the District Court correctly concluded, in the light of the principles enunciated in *Steffel v. Thompson* and *Heller v. New York*, and upon findings of harassment and bad faith enforcement to deter constitutional rights, that *Pullman* and federal equity abstention were not required.

4. Whether the District Court correctly held that the California obscenity statute, as interpreted by the state courts of California, fails to meet the constitutional standards mandated by the Court in *Miller v. California*, 413 U.S.15.

Statutes Involved.

In addition to the statutes listed by appellants, California Penal Code §1538.5 appears as Appendix A hereto.

Statement of the Case.

On November 29, 1973, Appellees filed their Complaint in the United States District Court for the Central District of California, invoking the jurisdiction of that Court under 28 U.S.C. §§1331 and 1343. (A.

10-19.) The Complaint alleged that Appellants, law enforcement authorities of the City of Buena Park and the County of Orange, State of California, had acted to deprive Appellees, a corporation operating a motion picture theatre in Buena Park, and the owner of the property on which the theatre is located, of rights guaranteed under the First, Fourth and Fourteenth Amendments to the United States Constitution (42 U.S.C. §1983).

The Complaint alleged that Appellants, acting under color of the state obscenity statutes, caused Appellees' theatre to cease exhibition of a film by seizing four copies of the film within two days after the theatre commenced exhibiting it, and prior to any judicial determination in an adversary proceeding that the film was obscene. It was alleged that the multiple seizures of the film, together with seizures of cash receipts present at the theatre, were undertaken for the purpose of harassing Appellees and suppressing exhibition of the film to the public. (A. 15-16.) The Complaint prayed for a declaratory judgment that the state obscenity statutes, on their face and as construed and applied to Appellees, violate the First and Fourteenth Amendments to the United States Constitution. The Complaint also prayed for an injunction against further seizures of the same film and for the return to Appellees of all but one copy on the film. (A. 19.) The Complaint also contained a prayer for damages, which later was dismissed without prejudice. (A. 7.)

The facts concerning the multiple seizures essentially were undisputed. In its Memorandum Opinion filed June 4, 1974 (Appendix "A" to Jurisdictional Statement, pp. 1-5), the court below made findings of fact respecting the seizures which Appellants do not chal-

lenge as clearly erroneous. The District Court made the following findings:

"1. On November 20, 1973, anticipating that the movie 'Deep Throat' would be exhibited in the City of Buena Park, in Orange County, California, three members of the Buena Park Police Department traveled to nearby Los Angeles County and there viewed the film in its entirety.

"2. On November 21, 1973, an affidavit and warrant were prepared describing the film, and arrangements made for a judge of a Municipal Court[1] to view the film if it was brought to Buena Park.

"3. At 12:30 P.M. on November 23, 1973, the officers, a deputy district attorney and the judge attended a showing of the film at plaintiff's theatre in Buena Park.

"4. After viewing about 45 minutes of the film, they retired to the sidewalk in front of the theatre, where the judge was presented with the previously prepared documents.

"5. A photographer hired by the theatre began photographing the judge and the officers while they reviewed the papers. One of the officers,

[1]The Judge with whom Appellants made arrangements to view the film and to receive the applications for search warrants was a judge of the Municipal Court of the Central Orange County Judicial District. (A. 36.) The theatre, however, is located in a different judicial district, the North Orange County Judicial District. (A. 92.) The seized property was turned over to the judge at his home, and the property remained in the judge's custody contrary to the applicable state law which provides that seized property is to remain in the custody of the police. (A. 37, 41.) See, California Penal Code §1536; *People v. Superior Court*, 28 Cal.App.3d 600, 607, fn. 3, 104 Cal. Rptr. 876 (1972).

acting on orders from the judge, stopped the photographer from taking any more pictures and seized the film in his camera.

"6. The search warrant was issued, and the officers seized the movie and posters advertising it. In describing the property to be seized, the warrant also contained the following handwritten addition:

'Money contained in the ticket booth & specifically for a $20.00 bill Ser. # B08574869B.'

All the cash in the box office was seized, an amount shown to be $305.00.

"7. That afternoon the theatre obtained another copy of the film for exhibition. At 3:00 p.m., the same police officers again viewed the film, and left to get another warrant. The affidavit accompanying the second warrant was an identical copy of the first, but also contains the following handwritten notation:

'Your affiant further states that said film was seized on Nov. 23, 1973 at approx. 1:30 p.m. after being viewed by Judge ..... with the exception of certain portions being edited different than the first film seized.

'Your affiant states that this copy of the film "Deep Throat" consists of (1) one additional act of sexual intercourse and numerous small changes at different portions of the film.'

"8. The same Municipal Court judge signed the second warrant without seeing the film again, and the officers returned to the theatre at 4:30 p.m. Another copy of 'Deep Throat' was seized, along with some advertising posters.

"9. The typed second warrant was also an identical copy of the first, but contained the following handwritten addition in describing the property to be seized: 'Money contained in the ticket booth cash drawer.' $159.00 in cash was seized from the box office.

"10. The theatre obtained yet another copy of 'Deep Throat.' At 7:45 p.m. the same day, the same officers again returned to the theatre and viewed the film in its entirety. They then contacted the judge, who signed another search warrant at 9:00 p.m. The affidavit in support of the warrant was identical to the first and second, but contained the following handwritten notation:

'Your affiant states that said film was seized on Nov. 23, 1973 at approx. 1:30 p.m. and 4:35 p.m. after being viewed by the Honorable Judge .... who issued a search warrant.

'Your affiant states that the film in question is the same film viewed by Judge ..... with the exception of certain portions of the film being edited differently than the film viewed by the Honorable Judge .....

'Your affiant states that this copy of the film "Deep Throat" consists of (1) one additional act of sexual intercourse not shown in the copy viewed by Judge ..... and numerous small changes at different portions of the film.'

"11. The judge decided he wished to view the film again, and returned with the officers to the theatre at 9:15 p.m. He ordered the officers to

execute the warrant, and a third copy of the film was seized.

"12. The third warrant was identical to the first and second warrants, but also contained this handwritten notation, describing the property to be seized: 'All monies on premises received, in cash drawers or safes at above location.' The officers brought a locksmith to the theatre, who opened the business' safe. Money from the cash drawer and the safe totaling $4,082.33 was seized.

"13. At 2:30 p.m. the following day, the same officers turned over all the seized items to the judge at his home, and advised him that they believed the movie was going to be shown again.

"14. The officers went to the theatre and viewed the film. They returned to the judge's home with another of the identical affidavits, with the same handwritten notation. At 4:00 p.m. the judge signed a search warrant identical to the first three from the day before, with an additional handwritten entry describing the property to be seized: 'All monies received, in cash drawers or safes.'

"15. The warrant was served, and another copy of 'Deep Throat', some promotional posters and $197.18 in cash were seized.

"16. The theatre ceased exhibition of the movie, closed until November 26, 1974, and thereafter began showing another film." (Jurisdictional Statement, Appendix "A", pp. 1-5).

The plans for obtaining the four search warrants were made by the Orange County District Attorney's Office, and deputy district attorneys directed the activities

of the police. (A. 37, 42, 54.) Appellants conceded that the seizure of four copies of the same film would be improper had the copies not been "different." (A. 63.) Deputy District Attorneys Sears and Anderson advised the police officers "to view every subsequent copy of the movie 'Deep Throat' and if [they] detected differences between any copies to seize them also with a new search warrant." (A. 43, 48-49, 54.) However, in none of the affidavits filed by Appellants is it claimed that the alleged "differences" between the four seized copies of the film were substantial or significant. Indeed, the affidavits in support of the third and fourth search warrants do not even claim that any differences exist among the second, third and fourth copies of the films seized. Appellants have never even claimed that so much as 30 seconds of any of the four copies is different from any of the others.[2]

The four seizures occurred on November 23 and 24, 1973. On November 26, Appellants applied for and were granted, *ex parte*, a Temporary Restraining Order against further exhibition of "Deep Throat" pending hearing on an Order to Show Cause "why all copies of the . . . film should not be ordered seized as contraband." (A. 64-65.) The Order was issued by a judge of the Superior Court for the County of Orange.

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[2]When the District Attorney's Office later sought and obtained an order from the Orange County Superior Court to seize all copies of the film "Deep Throat," only one of the four previously seized copies was exhibited to the judge. (A. 49-50, 74.) Subsequently, for purposes of the trial of the state obscenity prosecution arising out of the exhibition of "Deep Throat" at Appellees' theatre, the District Attorney's Office stipulated that the four seized copies of the film were "identical in every respect." (A. 79.) The theatre projectionist stated that he had inspected 3 of the 4 seized prints and that the three were identical to one another. (A. 30.)

The same day, Appellants filed a misdemeanor complaint against Edward Lee Bailey and James Samuel Lytell, alleging that they had violated the state obscenity statutes by exhibition of "Deep Throat" at Appellees' theatre. (A. 121.)[3]

The Order to Show Cause came on for hearing before the Orange County Superior Court on November 27, 1973. At the hearing, Appellees contended that the Superior Court was without jurisdiction to enjoin exhibition of the film, to declare it obscene, or to issue ~~an order~~ to seize all copies of the film. (A. 68.) Appellees filed with the Superior Court a document stating "By appearing in the above-entitled action, Defendants do not waive but, on the contrary, specifically reserve all federal constitutional claims for purposes of federal jurisdiction." (A. 75.) The Superior Court ruled that it had jurisdiction.[4] (A. 75.) The proceedings were con-

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[3]Appellants never offered an explanation as to why they chose to apply to a Superior Court judge for the Temporary Restraining Order and Order to Show Cause, after they had asked a judge of the Municipal Court of the Central Orange County Judicial District to issue the first four search warrants, and while filing the misdemeanor obscenity complaint in the Municipal Court of the North Orange County Judicial District, wherein the theatre is located. Although Appellants claimed that the four seized films were in the "custody and control" of the Municipal Court judge who issued the four search warrants (A. 37), one of the seized copies was exhibited to the Superior Court judge on November 27, 1973. (A. 62.)

[4]The nature of the proceedings in the Orange County Superior Court never was clear. The Application for Order to Show Cause and for a Temporary Restraining Order filed by Appellants in the Superior Court prayed for the issuance of an Order to Show Cause "why all copies of . . . 'Deep Throat' should not be declared obscene by this Honorable Court and why they should not be forever enjoined from further exhibition, showing, displaying, advertising, selling, or publishing said copies or any part thereof." (A. 66.) The Order to Show Cause actually issued required Appellees to "show cause why all copies

(This footnote is continued on next page)

tinued to the following day in order for the Court to view the film. Appellees were excused from returning, since they had entered solely a special appearance for the purpose of contesting jurisdiction. (A. 73.) The next day, the Superior Court viewed one of the four seized copies of "Deep Throat," heard opinion testimony that the film was obscene from the husband of Deputy District Attorney Sears (A. 73), pronounced the film obscene "beyond any reasonable doubt"[5] (A. 74), and issued an order to seize all copies of the film currently at Appellees' theatre or which might be found there at any time in the future. (A. 74.)

As aforesaid, Appellees filed their Complaint in the United States District Court on November 29, 1973. At that time, the only criminal prosecution pending with respect to the exhibition of "Deep Throat" at Appellees' theatre was the misdemeanor complaint filed against Messrs. Bailey and Lytell, theatre employees, in the Municipal Court of the North Orange County Judicial District. (A. 121.) Neither Bailey nor Lytell were plaintiffs in the federal action. The state misdemeanor complaint was not amended by Appellants to name as defendants the federal Plaintiffs, Miranda and

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of the . . . film should not be ordered seized as contraband." (A. 65.) Other than Appellants' Application for an Order to Show Cause and a Temporary Restraining Order itself, no action ever was pending in the Superior Court, either civil or criminal, with respect to exhibition of "Deep Throat" at Appellees' theatre.

[5]The Superior Court was without jurisdiction to find the film obscene "beyond any reasonable doubt." Under California law, the only legal question properly before a court asked to issue a search warrant for the seizure of alleged obscenity is whether or not there is probable cause to believe the matter obscene. Obscenity *vel non* may not be determined at such a hearing: *Mónica Theater, Inc. v. Municipal Court*, 9 Cal.App.3d 1, 88 Cal.Rptr. 71 (hearing denied by California Supreme Court).

Walnut Properties, until January 15, 1974. (A. 121.) Although the federal Summons and Complaint was not officially served on all Appellants until January 14, 1974 (A. 6), Appellants appeared in Federal Court before the Honorable Lawrence T. Lydick in opposition to Appellees' Application for a Temporary Restraining Order on both November 29 and December 3, 1973. (A. 5.) Appellees' request for a Temporary Restraining Order was taken under submission by Judge Lydick until December 28, 1973, when an Order was filed denying a Temporary Restraining Order (A. 55-58) and certifying to the Chief Judge of the United States Court of Appeals for the Ninth Circuit that a District Court of three judges was required pursuant to 28 U.S.C. §2284. (A. 55.)

On January 8, 1974, the Chief Judge of the Ninth Circuit appointed a Three-Judge District Court composed of Circuit Judge Walter Ely, District Judge Warren J. Ferguson, and Senior District Judge William G. East. The Order provided that "If there be any objection to the membership of the Court as constituted, a party shall file the objection within 14 days after the date of the filing of this Order." (A. 84-85.) Although a copy of the aforesaid Order was not mailed to the parties herein until February 8, 1974 (A. 82), Appellants never raised any objection to the membership of the Three-Judge Court at any time prior to this appeal.

On June 4, 1974, the Three-Judge Court issued a Memorandum Opinion and Judgment, declaring the California obscenity statutes unconstitutional and ordering Appellants to return to Appellees the property seized from the theatre on November 23 and 24, 1973. (Appendix "A" to Jurisdictional Statement.)

On June 14, 1974, within 10 days after entry of the aforesaid judgment, Appellants Gourley, Fontecchio, Hafdahl and Harrison filed and served a document entitled "Notice of Motion for Rehearing and Relief from Judgment and to Amend and Alter Judgment and to Correct Errors in the Judgment and Record and to Stay Judgment Pending Determination of That Motion (F.R.C.P. 59(a), 59(e), 60(a), 60(b), and 62." (A. 90.)[6] Also on June 14, 1974, Appellants Hicks and Sears served and filed a document entitled "Notice of Motion for Relief from Judgment, For Rehearing, and For Stay of Judgment Pending Determination of That Motion" which stated that such motion was brought pursuant to F.R.C.P., Rules 60 (b) and 62. (A. 91.)[7] On June 24, 1974, the Court filed an Order stating that "The motions of the defendants filed June 14, 1974, and scheduled for hearing on July 1, 1974, will be submitted and determined without oral hearing. . . .". (A. 93.) In connection with Appellants' applications for stay of the June 4 judgment pending determination of their post-judgment motions, in which they contended that return of all four copies of the film would terminate the pending state misdemeanor prosecution, Appellees filed an affidavit on June 17, 1974, stating that they "do not op-

[6]The document further recited that "The Court will be asked to set aside the findings of fact and conclusions of law and judgment heretofore entered in that the Court erred in its ruling, the judgment is contrary to law, and the Court made errors of fact and [sic] its findings which should be corrected." (A. 90.)

[7]The Points and Authorities filed concurrently with the aforesaid document by Appellants Hicks and Sears cited the case of *Gila River Ranch, Inc. v. United States*, 368 F.2d 354, 356-357 (9 Cir. 1966) as follows: "Why should not the trial court have the power to correct its own judicial error under 60 (b)(1) within a reasonable time . . . and thus avoid the inconvenience and expense of an appeal. . . ."

pose the granting of a stay of judgment which would permit [Appellants] to retain one copy of the film pending a determination of [Appellants'] post-trial motions, and pending appeal, should an appeal be taken." (A. 94-95.)

On July 5, 1974, while the aforesaid post-judgment motions were under submission, Appellants filed their Notices of Appeal to this Court. (A. 9.) Notwithstanding the filing of their Notices of Appeal, Appellants continued to urge the court below to grant Appellants' various post-judgment motions.[8]

On July 26, 1974, the Appellate Department of the Orange County Superior Court[9] reversed an order made by the Municipal Court in which the misdemeanor obscenity prosecution is pending. The Muncipal Court had suppressed as evidence the third and fourth seized copies of "Deep Throat." (A. 80-81.)[10] The only issue before the Appellate Department of the Superior Court was the propriety of the Municipal Court's order suppressing as evidence in the criminal prosecution two of the four seized copies of the film. The Superior Court order of November 27, 1973, calling for the seizure of all copies of "Deep Throat"

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[8]On July 30, 1974, Appellants filed Supplemental Points and Authorities in support of their post-judgment motions. (A. 114.)

[9]The Appellate Department of the Superior Court has jurisdiction to hear appeals from municipal courts in criminal matters.

[10]The Municipal Court found that the affidavits in support of the third and fourth search warrants issued for the seizure of "Deep Throat" appeared on their face to show that the second, third and fourth copies of the films seized were identical, and ordered the third and fourth copies suppressed pursuant to California Penal Code §1538.5. (A. 80-81.) California Penal Code §1538.5 provides for the suppression as evidence of property seized in violation of the Fourth Amendment. (See Appendix "A" hereto.)

which might be found at Appellees' theatre then or in the future was not appealable to the Appellate Department of the Superior Court and the Appellate Department's July 26, 1974 order did not purport to decide the validity of the November 27 order for the seizure of all copies of the film.

On July 29, 1974, Appellants embarked upon a second series of multiple seizures of films from Appellees' theatre, which had resumed exhibiting "Deep Throat", together with a film entitled "The Devil in Miss Jones." Between July 29 and August 2, 1974, Appellants seized seven additional copies of "Deep Throat" and four copies of "Devil in Miss Jones." (Findings of Fact and Conclusions of Law entered September 5, 1974, appearing as Appendix "B" hereto.) No claim was made that the copies were "different."

On August 3, 1974, Appellees applied for and were granted a Temporary Restraining Order by a member of the Three-Judge Court, enjoining Appellants from seizing any additional copies of "Deep Throat" and "Devil in Miss Jones." (Appendix "C" to Jurisdictional Statement, p. 26.)[11] Appellants also were ordered to show cause on August 12, 1974, why a Preliminary Injunction should not issue and why Appellants should not be held in contempt. Following hearing on the Order to Show Cause on August 12, 1974 before the Honorable Warren J. Ferguson, the Court vacated the Order to Show Cause *re* Contempt, and ordered that

[11]The Temporary Restraining Order is incorrectly printed in Appendix "C" to the Jurisdictional Statement. Paragraph Nos. 1 and 3 printed as part of the Temporary Restraining Order at page 28 of Appendix "C" to the Jurisdictional Statement were stricken by the Court. Only Paragraph No. 2 enjoining further seizures was issued.

a Preliminary Injunction issue, enjoining Appellants from seizing any additional copies of "Deep Throat" and "Devil in Miss Jones" from Appellees' theatre. (R. 283.) The Preliminary Injunction and Findings of Fact and Conclusions of Law with respect thereto were entered on September 5, 1974. (Appendix "B" hereto.)

On September 30, 1974, the Three-Judge Court below filed a Supplemental Memorandum Opinion (A. 120) setting forth its findings and conclusions with respect to Appellants' post-judgment motions. Pursuant thereto, the Court entered an amendment to the judgment on June 4, 1974. (The Amendment to the Judgment appears as Appendix "B" to Appellees' Motion to Dismiss or Affirm.) The amendment deleted Paragraph 2 of the June 4 judgment, requiring the return to Appellees of all four seized films and cash and added a new Paragraph 2, providing that "The [Appellants] shall in good faith petition the Municipal Court of the North Orange County Judicial District to return to the [Appellees] three of the four film prints seized from the [Appellees] on November 23 and 24, 1973 in the City of Buena Park."[12] The District Court reaffirmed its declaratory judgment that the California obscenity statutes are unconstitutional.

On October 9, 1974, Appellees applied to a member of the court below, the Honorable Warren J. Ferguson, for an Order to Show Cause why Appellants should not be enjoined from prosecuting the amended misdemeanor complaint charging Appellees and their employees with violating the state obscenity statutes by

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[12]Appellants contended in their post-judgment motions that they had no power to return any of the seized films because they were in the custody of the Municipal Court. (A. 120.)

exhibition of "Deep Throat." Appellees also sought a Temporary Restraining Order enjoining the said prosecution pending hearing on the Order to Show Cause. Both the Order to Show Cause and the Temporary Restraining Order were denied by District Judge Ferguson on October 9. (R. 332.)

On October 30, 1974, Appellants Gourley, Fontecchio, Hafdahl and Harrison filed Notice of Appeal to this Court from the Amendment to Judgment entered September 30, 1974. (R. 338.)[13]

Summary of Argument.

1. The District Court entered a judgment on June 4, 1974. Within ten days after entry of that judgment, motions seeking reconsideration by the Court of basic findings of fact and conclusions of law were both served and filed. One of the motions, to alter and amend the judgment, was made expressly pursuant to F.R.C.P. Rule 59(e). The other motions, although differently styled, nevertheless sought reconsideration of the judgment on substantially the same grounds, challenging as erroneous material findings of fact and conclusions of law made by the District Court.

The aforesaid post-judgment motions were timely made because they were served and filed within ten days after entry of the judgment, and Rule 59(e) provides that a motion thereunder be "served not later than ten days after the entry of the judgment." The

[13]The said Notice of Appeal was taken "from the amendment to judgment entered in this action on September 30, 1974 . . . and the whole of that judgment, including but not limited to the declaring [sic] the California obscenity statute . . . to be unconstitutional." (R. 338.) The said Appellants the same day filed a Protective Notice of Appeal to the Court of Appeals for the Ninth Circuit. (R. 335.)

law is clear that service of the motion constitutes its making.

On July 5, 1974, while the post-judgment motions were under submission, Appellants filed Notices of Appeal to this Court. On September 30, 1974, the court below filed a supplemental memorandum opinion setting forth its findings and conclusions with respect to the post-judgment motions and, pursuant thereto, entered an amendment to the June 4 judgment.

Rule 4(a) of the Federal Rules of Appellate Procedure provides that the running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the District Court by any party pursuant to, *inter alia*, Rule 59(e), and the full time for appeal commences to run from the entry of an order granting or denying such a motion. Moreover, any motion that draws in question the correctness of the judgment, when made within ten days following entry of the judgment, is functionally a motion under Rule 59(e) regardless of what it is styled.

It is clear that the service and filing of Appellants' variously styled post-judgment motions within ten days after entry of the June 4 judgment, destroyed the finality of that judgment, and rendered the Notices of Appeal filed on July 5, 1974, premature. Because the said Notices of Appeal were premature, the District Court had jurisdiction to pass upon Appellants' post-judgment motions and to enter the amendment to judgment on September 30, 1974. The governing law provides that the improvident taking of an appeal cannot effectively destroy the authority of the court below to proceed upon motions properly before it.

The provisions of Rule 4(a) of the Federal Rules of Appellate Procedure, providing that the service and

filing of certain motions terminates the running of the time for appeal, are based upon rules of reason developed from the case law and the principle behind them is applicable to appeals to this Court. This Court has held that a direct appeal was premature where a motion to amend the district court's findings was pending at the time the notice was filed and that, notwithstanding the filing of such premature notice of appeal, the district court was not deprived of jurisdiction to pass upon the pending motion.

It follows that the District Court had jurisdiction to decide the post-judgment motions and to enter the amendment to judgment on September 30, 1974. Although only certain of the Appellants have filed Notice of Appeal to this Court from the amendment to judgment entered September 30, it would appear that the premature Notices of Appeal should be treated as having been taken from the judgment as amended on September 30.

2. Under 28 U.S.C. §1253, an aggrieved party in any civil action required to be heard and determined by a district court of three judges "may appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction." 28 U.S.C. §2281 provides that a three-judge court is required to hear an application for an interlocutory or permanent injunction restraining the enforcement of any state statute by restraining the action of any state officer in the enforcement or execution of such statute upon the ground of its unconstitutionality.

It is submitted that the amendment to the judgment entered by the District Court on September 30, requiring Appellants to petition the state court to return to

Appellees three of the four seized film prints, is not within the direct appeal jurisdiction of this Court because it is not an injunction restraining the enforcement, operation or execution of a state statute upon the ground of the statute's unconstitutionality.

Other than the aforesaid injunction, the District Court granted only declaratory relief with respect to the state obscenity statutes. It is firmly established that §1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone, but such appeal lies only with the Court of Appeals. This Court has emphasized repeatedly that §1253 is to be narrowly construed since loose construction would defeat the congressional purpose to keep within narrow confines the appellate docket of this Court.

Appellants' jurisdictional claim is that the District Court's orders of June 4 and September 30, respecting the return of seized film prints are injunctions within the meaning of 28 U.S.C. §1253, relying upon the decision in *Perez v. Ledesma*, 401 U.S.82. In *Perez*, this Court held that it had direct appeal jurisdiction over an order of a three-judge court returning all property seized as allegedly obscene to its owner and suppressing the property as evidence in a pending state criminal prosecution. Such order operated to terminate the pending prosecution and constituted an injunction against enforcement of the state obscenity statute.

The District Court's judgment of June 4 ordered all four prints of the film seized returned to Appellees. However, the judgment was amended on September 30 to provide that only three of the four seized prints be returned, permitting Appellants to retain one complete copy. Since Appellants had stipulated that only one

copy of the film was necessary for the trial of the state obscenity prosecution, the amended judgment neither terminates, disrupts, nor even affects the state prosecution. Appellants' reliance upon *Perez v. Ledesma* as conferring jurisdiction on direct appeal is thus misplaced.

Appellees' prayer for return of three of the four copies of the film seized rests upon a legal theory independent of the claim that the California obscenity statute is unconstitutional. Appellees contended in the court below that multiple seizures of the same film upon search warrants issued *ex parte,* violated the constitutional mandate of *Heller v. New York,* 413 U.S.483. The District Court's declaration that the California obscenity statutes are unconstitutional is not an indispensable prerequisite to its order requiring the return of three of the four film prints seized.

At the time Appellees' Complaint was filed, the prayer for an injunction to return seized property had the potential of restraining state officials in the enforcement of the state obscenity statutes, as in *Perez v. Ledesma.* The Complaint thus was viewed properly as requiring the convening of a three-judge court. Nevertheless, when it was stipulated that only one copy of the film was needed for the state obscenity prosecution, and when the District Court amended its judgment to permit Appellants to retain one copy of the film, the result is that the District Court's judgment, as amended, simply does not have the effect of restraining state officials in the enforcement of the state obscenity statutes.

With respect to this Court's direct appeal jurisdiction, this case is no different from those in which a properly convened three-judge court grants only declaratory relief with respect to the constitutionality of a

state or federal statute. This Court has eschewed literal interpretation of 28 U.S.C. §1253, looking instead to the basic policies therein expressed. Where, as here, a three-judge court grants only declaratory relief respecting the constitutionality of a state statute, and also grants an injunction to resolve fully the controversy between the parties, but which injunction does not restrain the enforcement of any state statute, the appeal should lie with the Court of Appeals in the first instance.

3. If the Court should proceed to a decision on the merits, it is submitted that the judgment of the District Court was correct. Neither the doctrine of abstention nor comity restraint was applicable in light of the facts which gave rise to the litigation. *Pullman* abstention was not required. The California courts have authoritatively construed the California statute and held that the *Miller* requirements have been met. Any defense in the state court that the statute was defective under the Federal Constitution would, therefore, be precluded. *Pullman* abstention is required only where applicable state law is unclear and where a state court interpretation of the state law question might obviate the necessity of deciding the federal constitutional issue.

Reliance by Appellants upon *Younger* is misplaced. In the first place, *Younger* presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved. In light of the ruling in *Enskat,* relegation to the state courts for a determination of the constitutional validity of the state statute would be futile. Moreover, the complaint prayed only for declaratory relief; an application for an order to show cause and temporary restraining order enjoining the criminal prosecution was denied;

and the Appellants were permitted to retain a copy of the motion picture film for use in the criminal proceedings. This is not a case involving the interruption or disruption of state proceedings, nor is it a case where the state proceedings offer a vehicle for vindicating Appellees' constitutional rights.

The decision of the Court in *Steffel v. Thompson* is clearly applicable. When the constitutionality of a state criminal statute is challenged in federal court, declaratory relief is appropriate if the plaintiff demonstrates a genuine threat of enforcement and the state criminal proceedings are not pending at the time the federal suit is commenced. At the time the complaint was filed by these Appellees, who were, respectively, the owner of the land where the theatre is located and the corporation engaged in the business of operating a motion picture theatre on the same property, no criminal proceeding was pending against them. The attempt by Appellants to argue that state criminal proceedings were vicariously pending against Appellees because a criminal complaint had previously been filed against theatre employees is without foundation. Initially, it should be noted that since the state courts have authoritatively decided that the state statute is constitutional, the Appellees lack an adequate remedy in the state courts for vindication of their federal claims. Moreover, the interests of the owner of the property and the operator of the theatre are distinct from those who were employed temporarily at the theatre. The vindication of Appellees' rights under the Civil

Rights Act should not be thwarted by a theory of "imputing" to Appellees a state criminal prosecution against other persons who may not necessarily raise constitutional issues as part of their defense, or who may be acquitted on other grounds, or who may decide not to appeal their convictions.

The contention that a state action may be deemed "pending" if the federal plaintiff is arrested or indicted after the federal complaint is filed also appears untenable. Such an approach would provide a ready device for state prosecutors to remove from the federal to the state court the litigation of constitutional claims made by the federal plaintiff. In the case herein, the District Court found that the subsequent institution of the criminal proceedings was in retaliation for the attempt by Appellees to have their constitutional rights judicially determined in the federal court. The effort to deprive the federal court of jurisdiction was manifest.

Since the undisputed facts called for the application of the principles enunciated in *Steffel*, the District Court correctly concluded that the strict requirements of *Younger* were only of tangential relevance to the issues involved in the case. Nevertheless, the findings and conclusions of the District Court were correct in establishing that the prosecutors and police in this case employed a scheme of harassment in bad faith to discourage the exercise of First Amendment rights. The objective criteria for determining bad faith official activity under the aegis of a challenged statute were

abundantly satisfied. The objective of the officials was suppression; the means used to attain the unlawful objective were harassment and bad faith enforcement. These were the findings of the District Court, and such findings were clearly not erroneous. The actions of the officials were not only lawless, but a deliberate attempt to circumvent the principles enunciated in *Marcus, One Quantity of Books, Heller* and *Roaden*. The arguments on behalf of the respective Appellants are without merit, and the decisions relied upon by the Appellants are either irrelevant or, rightly considered, opposed to appellants' positions.

4. In *Miller v. California,* 413 U.S.15, this Court sought to reduce the admitted chaos permeating the law of obscenity by holding that no statute regulating obscenity would pass constitutional muster unless the regulating law, as written or construed, specifically defined the sexual conduct subject to prohibition. The Court held that the *Roth-Memoirs* test was unworkable and failed to provide adequate guidelines. The Court also condemned the "casual practice" of *Redrup* pursuant to which courts were judging publications on a subjective basis.

The California Legislature has defined obscenity solely in *Roth-Memoirs* language. The statute as written does not enumerate proscribable sexual conduct. Plainly, the California statute as written fails to meet the *Miller* specificity requirement. In *People v. Enskat,* 33 Cal.App.3d 900, 109 Cal.Rptr. 433, the California Court of Appeal acknowledged that the statute as

written was defective, but concluded the pre-*Miller* decisions satisfied *Miller*. *Enskat* made no effort to give a *new* construction to the statute to bring it into harmony with *Miller*, observing that that was a legislative and not a judicial function. *Enskat*, in examining the pre-*Miller* cases, concluded that, under the statute, only hard core pornography is prohibited, *i.e.*, "graphic depictions of sexual activity" and "nudity with sexual activity". Impliedly recognizing that these general terms are lacking in precision, the court held that California was not required to meet the *Miller* specificity test because California retained the *Memoirs* "utterly without redeeming social value" test.

After *Enskat* examined the California statute in light of *Miller* and found it constitutional, the District Court rendered its decision invalidating the statute. The District Court found the statute, as written, unconstitutional. The District Court also found that the statute as construed by *Enskat* clearly failed to meet the requirements of *Miller*. Finally, the District Court found "particularly specious" the argument in *Enskat* that the retention of the ambiguous "utterly without redeeming social value" test dispensed with the due process specificity requirement of *Miller*.

The Appellants herein, the Attorney General of the State of California and the District Attorney of Orange County, are in substantial disagreement as to the correct meaning of the statute. The Attorney General argues that *Miller* does not require a "blueprint" of proscribed sexual conduct and asserts that general

terms, such as "hard core pornography", "graphic depictions of sexual activity" and "nudity with sexual activity", are sufficiently precise. The District Attorney, on the other hand, seeks to read specific sexual conduct into the statute. The Attorney General and the District Attorney are also in disagreement as to whether the proscribed "sexual acts" include simulated acts. The disagreement between the law enforcement officials stems from the fact that the statute as written is defective and *Enskat* and the pre-*Miller* decisions speak only in generalities.

The District Court was clearly correct in concluding that the California statute as written and construed lacks the necessary precision and concreteness required by the Constitution.

Unless the *Miller* specificity requirement is overruled, the District Court's holding that the California statute is unconstitutional must be affirmed.

ARGUMENT.

I

The District Court Had Jurisdiction to Enter the Amendment to Judgment on September 30, 1974, Because Timely Motions Under F.R.Civ.P. Rule 59(e) Were Pending Prior to the Filing of the Notices of Appeal From the Judgment Entered June 4, 1974. However, the Premature Notices of Appeal May Be Treated as Though They Had Been Taken From the Judgment as Amended on September 30, 1974.

The District Court entered a judgment on June 4, 1974. On June 14, 1974, within 10 days after entry of the judgment, motions seeking reconsideration by the Court of basic findings of fact and conclusions of law were both served and filed. Appellants Gourley, Fontecchio, Hafdahl and Harrison served and filed a document entitled "Notice of Motion for Rehearing and Relief from Judgment and to Amend and Alter Judgment and to Correct Errors in the Judgment and Record and to Stay Judgment Pending Determination of that Motion (F.R.C.P. 59(a), 59(e), 60(a), 60(b), and 62)." (A. 90.) On the same day, Appellants Hicks and Sears served and filed a document entitled "Notice of Motion for Relief from Judgment, for Rehearing, and for Stay of Judgment Pending Determination of that Motion" which stated that such Motion was brought pursuant to F.R.C.P. Rules 60(b) and 62. (A. 91.) Although differently styled, both Motions sought reconsideration of the judgment on substantially the same grounds, challenging as erroneous certain material findings of fact and the conclusions of law made by the District Court in its Memorandum Opinion accompanying the judgment.

Appellants' Motions were "made" on June 14, 1974, the day they were served and filed, notwithstanding the fact that the Motions contained a notice that they were to be heard on July 1, 1974. F.R.C.P. Rule 59(e) provides that a motion to alter or amend a judgment be "served not later than 10 days after the entry of the judgment." It is clear that it is the service of the motion that constitutes its making. See, *Claybrook Drilling Company v. Divanco,* 336 F.2d 697 (10 Cir. 1964) (impliedly overruling the contrary holding cited by Appellants [Hicks Op. Br., pp. 30-31] in *Wagoner v. Fairview Consol. School Dist. No. 5,* 289 F.2d 480 (10 Cir. 1961); 9 Moore's Federal Practice §204.12 [2], text accompanying footnotes 11, 12 and 13.

On June 24, 1974, the District Court filed an order stating that "The motions of the defendants filed June 14, 1974, and scheduled for hearing on July 1, 1974, will be submitted and determined without oral hearing. . . ." (A. 93.) On July 5, 1974, while the aforesaid post-judgment motions were under submission, Appellants filed their Notices of Appeal to this Court. (A. 9.) On September 30, 1974, the District Court filed a Supplemental Memorandum Opinion (A. 120) setting forth its findings and conclusions with respect to Appellants' post-judgment motions and, pursuant thereto, entered an amendment to the June 4 judgment. (The amendment to the judgment appears as Appendix "B" to Appellees' Motion to Dismiss or Affirm.)

Rule 4(a) of the Federal Rules of Appellate Procedure provides, in pertinent part, that:

> "The running of the time for filing a notice of appeal is terminated as to *all* parties by a

> timely motion filed in the district court by *any* party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such Rules: . . . (3) granting or denying a motion under Rule 59 to alter or amend judgment. . . ." (Emphasis added.)

Moreover, any motion that draws in question the correctness of the judgment, when made within 10 days following entry of the judgment, is functionally a motion under Rule 59(e) regardless of what it is styled. Thus a motion "to reconsider" is treated as though it were a motion under Rule 59(e) and will destroy the finality of the judgment if, as here, the motion is timely made. See, *e.g., Hicklin v. Edwards,* 222 F.2d 921 (8 Cir. 1955); 9 Moore's Federal Practice, §204.12[1], text accompanying footnote 6. In addition, even though a motion for relief from a judgment under F.R.C.P. Rule 60(b) does not ordinarily affect the finality of a judgment, nevertheless where, as here, a motion labelled a Rule 60(b) motion is made not later than 10 days after entry of judgment, it is also a Rule 59(e) motion and will destroy the judgment's finality. See, *e.g., Woodham v. American Cystoscope Company,* 335 F.2d 551, 554-555 (5 Cir. 1964); 9 Moore's Federal Practice §204.12[1], text accompanying footnotes 10 and 11.

If the foregoing principles are applied to the present case, it is clear that the service and filing of Appellants' variously styled post-judgment motions within 10

days after entry of the June 4 judgment, destroyed the finality of that judgment, and rendered the Notices of Appeal filed on July 5, 1974, premature. Further, because the said Notices of Appeal were premature, because taken while timely motions under Rule 59(e) were pending, the District Court had jurisdiction to pass upon Appellants' post-judgment motions and to enter the amendment to judgment on September 30, 1974. See, *United States v. Crescent Amusement Company,* 323 U.S.173, 177-178; *Healy v. Pennsylvania R.R.,* 181 F.2d 934 (3 Cir. 1950); *Turner v. HMH Publishing Company,* 328 F.2d 136 (5 Cir. 1964); *Tucker v. Redding Company,* 53 F.R.D. 453 (D.C. Pa. 1971); 11 Wright & Miller, Federal Practice and Procedure §2821; 9 Moore's Federal Practice, §203.11, text accompanying footnote 14.

Appellants' reliance upon *United States v. Frank B. Killian,* 269 F.2d 494 (6 Cir. 1959) and *Keohane v. Swarco, Inc.,* 320 F.2d 429 (6 Cir. 1963) [Hicks Op. Br., pp. 29-30] appears misplaced. In *Killian,* a Rule 60(b) motion was filed by appellant on the same day that it filed notice of appeal from the judgment. The motion was filed more than 10 days after the judgment was entered. Accordingly, the Court held that the motion did not destroy the finality of the judgment and the notice of appeal was therefore effective to deprive the trial court of power to entertain the motion. The *Keohane* case does take the seemingly inconsistent view that the taking of an appeal even though from a non-appealable order nevertheless transferred jursidiction to the Court of Appeals and deprived the District Court of jurisdiction to pass upon the motion to amend the judgment pending at the time the notice of appeal was filed. The position of

the Court in *Keohane* is contrary to the holding in *United States v. Crescent Amusement Company,* 323 U.S.173, 177-178, and, moreover, relied upon a decision of the Ninth Circuit, *Merritt-Chapman & Scott Corp. v. City of Seattle,* 281 F.2d 896 (1960), which subsequently was overruled in *Ruby v. Secretary of the United States Navy,* 365 F.2d 385 (9 Cir. 1966). In *Ruby,* the Court held that the improvident taking of an appeal cannot effectively destroy the authority of the court below to proceed upon motions properly before it.

> "Where the deficiency in a notice of appeal, by reason of untimeliness, lack of essential recitals, or reference to a non-appealable order, is clear to the district court, it may disregard the purported notice of appeal and proceed with the case, knowing that it has not been deprived of jurisdiction." (365 F.2d at 389.)

See also, 9 Moore's Federal Practice §203.11, text accompanying footnotes 13 through 20.

Most of the cases discussed above rely upon Rule 4(a) of the Federal Rules of Appellate Procedure, providing that the service and filing of certain motions terminates the running of the time for appeal and that the full time commences to run anew from the date of an order disposing of such motions. While Rule 4 applies to appeals from district courts to courts of appeals, the provisions of the Rule respecting the effect of timely post-judgment motions on the time for appeal and the finality of judgments are based upon rules of reason developed from the case law and the principle behind them is applicable to appeals to this Court. The principle is that a post-judgment motion that has

the potential for setting aside or modifying the judgment destroys its finality until the motion is acted upon by the court that rendered the judgment. *Leishman v. Associated Wholesale Elec. Company*, 318 U.S. 203. See, 9 Moore's Federal Practice §201.03[2-2], text accompanying footnotes 8 through 12. In *United States v. Crescent Amusement Company*, 323 U.S.173, the Court held that a direct appeal taken to this Court was premature where a motion to amend the district court's findings was pending at the time the notice was filed. The Court held further that notwithstanding the filing of the premature notice of appeal, the district court was not deprived of jurisdiction to pass upon the pending motion.

> "The motion to amend the findings tolled the time to appeal if it was not addressed to 'mere matters of form but raised questions of substance' e.g., if it sought a 'reconsideration of certain basic findings of fact and the alteration of the conclusions of the court.' Leishman v. Associated Wholesale Elec. Company, 318 U.S. 203, 205. . . . An examination of the motion makes plain that matters of substance were raised. The appeal in No. 17 was accordingly premature. [citation omitted] But it does not follow that the district court had no jurisdiction to allow the appeal in No. 18 [the appeal which followed the district court's ruling on the motion to amend its findings]. An appeal can hardly be premature (and therefore a nullity) here and yet not premature (and therefore binding) below." (323 U.S. at 177-178).

See also, *United States v. Healy*, 376 U.S.75; *United States v. Adams*, 383 U.S.39.

From all of the foregoing, it follows that the District Court clearly had jurisdiction to decide the post-judgment motions and to enter the amendment to judgment on September 30, 1974. Although only Appellants Gourley, Fontecchio, Hafdahl and Harrison filed Notice of Appeal to this Court from the amendment to judgment entered September 30, it would appear that the premature Notices of Appeal filed by Appellants Hicks, Sears and Younger should be treated as having been taken from the judgment as amended on September 30. See, *Ruby v. Secretary of United States Navy*, 365 F.2d 385, 389 (9 Cir. 1966).

II

The Appeal Herein Is Not Within the Jurisdiction of This Court Because the District Court's Judgment, as Amended, Grants Only Declaratory Relief Respecting the Constitutionality of State Statutes and, Although an Injunction Also Is Granted, the Injunction Does Not Restrain the Action of Any State Officer by Restraining the Enforcement, Operation or Execution of Any State Statute.

Under 28 U.S.C. §1253, an aggrieved party in any civil action required to be heard and determined by a district court of three judges "may appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction." 28 U.S.C. §2281 provides that:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any state statute by restraining the action of any officer of such state in the enforcement or execution of such statute . . . shall not be granted . . . upon the ground of the unconstitutionality of such stat-

ute unless the application therefor is heard and determined by a district court of three judges under §2284 of this Title."

It is not the mere grant or denial of any injunction by a three-judge court which permits a direct appeal to this Court, but rather the grant or denial of an injunction restraining enforcement of a state statute. *Board of Regents of University of Texas System v. New Left Ed. Project,* 404 U.S.541. It is submitted that the amendment to the judgment entered by the District Court on September 30, requiring Appellants to petition the state court to return to Appellees three of the four seized film prints, is not within the direct appeal jurisdiction of this Court because it is not an injunction restraining the enforcement, operation or execution of a state statute upon the ground of the unconstitutionality of such statute.

This Court has emphasized repeatedly that 28 U.S.C. §1253 is to be narrowly construed since loose construction would defeat the congressional purpose to keep within narrow confines the appellate docket of this Court. *Gonzalez v. Automatic Employees Credit Union,* 95 S.Ct.289; *Goldstein v. Cox,* 396 U.S.471. 478. The Court has stressed that the three-judge court legislation, including the provisions for direct appeal to this Court, is not "a measure of broad social policy to be construed with great liberality," but is rather "an enactment technical in the strict sense of the term and to be applied as such." *Mitchell v. Donovan,* 398 U.S. 427, 431. Pursuant to these principles it is firmly established that §1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone, but such appeal lies only with the Court of Ap-

peals. *Gerstein v. Coe,* 94 S.Ct.2246; *Gunn v. University Committee,* 399 U.S.383; *Mitchell v. Donovan,* 398 U.S.427; *Rockefeller v. Catholic Medical Center, etc.,* 397 U.S.820; see also, *Roe v. Wade,* 410 U.S.113, 123.

Appellees sought declaratory relief only with respect to the constitutionality of the California obscenity statutes, and only a declaratory judgment was entered. Appellants concede the foregoing, but argue instead that the June 4 and September 30 orders respecting the return of seized prints are injunctions within the meaning of 28 U.S.C. §1253, relying upon the decision in *Perez v. Ledesma,* 401 U.S.82. In *Perez,* a three-judge court entered a judgment ordering the return of material seized on the ground of its alleged obscenity by state officials and further ordered the suppression as evidence of the seized property in a pending state criminal prosecution. Since all of the material seized was ordered returned and its use as evidence in the state prosecution suppressed, this Court viewed the injunction as "crippling Louisiana's ability to enforce its criminal statute against Ledesma," (401 U.S. at 85) and, accordingly, held the appeal to be within its jurisdiction under §1253. Indeed, the Court stated that:

> "It is difficult to imagine a more disruptive interference with the operation of the state criminal process short of an injunction against all state proceedings. Even the three-judge court recognized that its judgment would effectively stifle the then-pending state criminal prosecution." (401 U.S. at 84).

Appellants' reliance upon *Perez v. Ledesma* would be understandable if the original judgment entered June 4

had not been amended. The June 4 judgment originally had directed Appellants to return to Appellees all copies of the seized film. The return of all of the seized prints probably would have terminated the misdemeanor state prosecution concerning the exhibition of "Deep Throat" at Appellees' theatre. However, in the course of litigating Appellants' post-judgment motions, Appellees informed the District Court that they sought the return only of the excess prints that had been seized. (A. 94-95.) Accordingly, the District Court entered an amendment to the judgment on September 30, requiring Appellants to petition the state court to return to Appellees only three of the four seized film prints.[14]

The District Court had jurisdiction to enter the aforesaid amendment to the judgment on September 30, as demonstrated in Point I, *supra*. Since Appellants had stipulated that only one copy of the film was necessary for the trial of the state obscenity prosecution (A. 79), the order requiring the return of only three of the four seized films neither terminates, disrupts, nor even affects the state prosecution arising out of the exhibition of "Deep Throat" at Appellees' theatre. The judgment of the court below, as thus amended, is totally unlike the injunctive orders in *Perez v. Ledesma*.

Appellees' prayer for return of three of the four copies of "Deep Throat" seized from the theatre rests

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[14]The direction to Appellants to petition in good faith the state court to return the property was the result of Appellants' contention made in their post-judgment motions that they had no power to return any of the seized films because they were in the custody of the State Municipal Court. (A. 120.)

upon a legal theory independent of the claim that the California obscenity statute is unconstitutional. Appellees contended in the court below that multiple seizures of the same film upon search warrants issued *ex parte*, violated the constitutional mandate of *Heller v. New York*, 413 U.S.483, in which this Court made it clear that the Constitution prohibits "seizing films to destroy them or to block their distribution or exhibition" (93 S.Ct. at 2794) where, as here, the multiple seizures occur prior to a judicial determination in an adversary proceeding that the material is obscene. (A. 32-34.) In other words, the District Court's declaration that the California obscenity statutes are unconstitutional is not an indispensable prerequisite to its order requiring the return of three of the four film prints seized.

At the time Appellees' Complaint was filed, the prayer for an injunction to return seized property had the potential of restraining state officials in the enforcement of the state obscenity statutes, as in *Perez v. Ledesma*. The Complaint thus was viewed properly as requiring the convening of a three-judge court. It was not until January 29, 1974, two months after the Complaint was filed, and one month after Judge Lydick requested the convening of a three-judge court (A. 5), that the prosecution and defense in the state obscenity prosecution stipulated that only one copy of the film would be required for the obscenity trial. (A. 129.) As a result of that stipulation, and the District Court's amendment to the judgment permitting Appellants to retain one copy of the film, the judgment of the court

below, as amended. simply does not have the effect of restraining state officials in the enforcement of the state obscenity statutes. For purposes of controlling this Court's direct appeal jurisdiction, this case is no different from those in which a properly convened three-judge court grants only declaratory relief with respect to the constitutionality of a state or federal statute. Appeal from the grant of such declaratory relief lies only with the Court of Appeals. See, *e.g., Gerstein v. Coe,* 94 S.Ct.2246; *Gunn v. University Committee,* 399 U.S. 383. Although the present appeal falls within the literal words of 28 U.S.C. §1253, this Court's interpretation of that legislation "has frequently deviated from the path of literalism." *Gonzalez v. Automatic Employees Credit Union,* 95 S.Ct.289, 293. Where, as here, a three-judge court grants only declaratory relief respecting the constitutionality of a state statute, and also grants an injunction to resolve fully the controversy between the parties, but which injunction does not restrain the enforcement, operation or execution of any state statute, the appeal should lie with the Court of Appeals in the first instance. As the Court has recently noted:

> "Discretionary review in any case would remain available, informed by the mediating wisdom of a court of appeals." *Gonzalez v. Automatic Employees Credit Union,* 95 S.Ct.289, 295.

III

The Case Is Governed by the Principles Enunciated by the Court in Steffel v. Thompson. Pullman Abstention Was Inappropriate, and the District Court Correctly Found and Concluded That Determination on the Merits Was Not Barred by the Principles of Younger or Samuels. The Findings of the District Court of Official Lawlessness to Prevent the Exercise of First Amendment Rights Are Clearly Supported in the Record.

A. If the Court should proceed to a decision on the merits, it is submitted that the judgment of the District Court, as amended, was correct. Neither the doctrine of abstention, nor comity restraint, were applicable in the light of the facts which gave rise to the litigation.

There is no serious claim made by Appellants that *Pullman* abstention was required. The Complaint filed by Appellees in the federal court alleged, among other things, the multiple seizures of prints of a motion picture film in violation of the free speech and press provisions of the Constitution and the unconstitutionality of the state obscenity statutes in violation of the First and Fourteenth Amendments, as well as the interpretive decisions of this Court. (A. 15-17.) The validity of the state statutes was not determined by this Court in *Miller v. California,* 413 U.S.15. Instead, this Court held that, while a state obscenity statute might be invalid on its face under *Miller,* still the statute might not offend *Miller* if a prior authoritative construction included the *Miller* specificity. Following the decision in *Miller,* the California courts authoritatively construed

the California statutes and held that the *Miller* requirements had been met. *People v. Enskat*, 33 Cal.App.3d 900, 109 Cal.Rptr. 433 (1973), hearing denied by the California Supreme Court, October 24, 1973. Before the District Court, the Appellants here constantly asserted that *Enskat* was now the law in California, a view accepted by the District Court below. "Thus, any defense in state court that the statute is defective under the Federal Constitution would be precluded." (Appendix "A" to Jurisdictional Statement, p. 8.)

This Court has recently affirmed [*Kusper v. Pontikes*, 414 U.S.51] that the doctrine of abstention contemplates deference to state court adjudication only when the issue of state law is uncertain. On the other hand, where it can be fairly concluded that the state statute is not susceptible of an interpretation that might avoid the necessity for constitutional adjudication, abstention amounts to an abdication of the responsibility of the federal courts to protect every right granted or secured by the Constitution of the United States. Federal courts have abstained only where applicable state law which would be dispositive of the controversy was unclear and where a state court interpretation of the state law question might obviate the necessity of deciding the federal constitutional issue. *Harman v. Forssenius*, 380 U.S.528, 534; *Zwickler v. Koota*, 389 U.S.241; *Gay v. Board of Registration Commissioners*, 466 F.2d 879 (6 Cir. 1972); *Hobbs v. Thompson*, 448 F.2d 456, 461-463 (5 Cir. 1971); *Detco, Inc. v. Breier*, 349 F.Supp. 537 (D.C. Wisc. 1972).

B. The Appellants attempt to distinguish *Steffel*, and place principal reliance on *Younger*. The decision of the Court in *Younger v. Harris*, 401 U.S.37,

however, does not appear to support Appellants, either on the law or the facts. In the first place, *Younger* presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved. *Gibson v. Berryhill*, 411 U.S.564. Here, the predicate for a *Younger v. Harris* ruling was lacking because, in the light of the ruling in *Enskat* by the California courts, a journey through the state court system would be futile. Moreover, the Complaint here prayed solely for declaratory relief with respect to the validity of the state obscenity statute (A. 19), and an application for an order to show cause and temporary restraining order enjoining the criminal prosecution was denied by District Judge Ferguson after rendition of the judgment of the three-judge court as amended. (R. 332.) In addition, the Complaint, while seeking the return of the excess copies of the film seized from the theatre, at the same time agreed that the defendants should be permitted "to make and retain a single copy of the said film". (A. 19.) The Supplemental Opinion of the District Court, after noting the stipulation entered into in the criminal case by the prosecutor and defense counsel, that all four of the prints seized were identical, observed that Appellees' counsel honored the stipulation and did not oppose the state officials' retaining one copy of the film. (A. 129.) Thus, this is not a case involving the interruption or disruption of state proceedings, nor is it a case where the state proceedings offer a vehicle for vindicating the Appellees' constitutional rights. See, *Heller v. New York*, 413 U.S. 483; *Cinema Classics, Ltd. v. Busch*, 339 F.Supp. 43 (C.D. Cal. 1972), aff'd. 409 U.S.807.

C. In *Steffel v. Thompson*, 415 U.S.452, the Court held that when the constitutionality of a state criminal

statute is challenged in federal court, declaratory relief is appropriate if the plaintiff can demonstrate a genuine threat of enforcement and if state criminal proceedings are not pending at the time the federal suit is commenced. Distinguishing *Younger* and *Samuels*, the Court stated, in *Steffel*, that the relevant principles of equity, comity and federalism have little force in the absence of a pending state proceeding. When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system. Accordingly, the District Court below was correct in holding:

> "The situation presents no danger of 'duplicative proceedings or disruption of the state criminal justice system,' *Steffel* at 9. The role of the federal court is unaffected, whether the attack is to the statute on its face or as applied, *Steffel* at 20-22. Here, the California statute is alleged to be facially invalid, but the decision in *Miller v. California, supra,* requires this court to pay due regard to the state judicial interpretation of the state [*sic*] as well. Finally, the fact that there may be related pending criminal prosecutions against some of the theatre employees does not affect this plaintiff's right to declaratory relief. *Steffel* at 18 n. 19. No barriers exist to prevent this court from examining the merits of plaintiff's claim." (Appendix "A" to Jurisdictional Statement, p. 9.)

See also, Supplemental Memorandum Opinion of September 30, 1974. (A. 122-123.)

The Appellants have sought to avoid the impact of *Steffel* by improvising two separate theories: the first,

that the state criminal proceedings were vicariously pending against Appellees because a complaint had previously been filed against the theatre employees; the second, that there was, in any event, a "pending" prosecution against Appellees when the criminal complaint was amended to include their names a day after the federal complaint was served upon Appellants, and more than six weeks after Appellants became aware that a federal complaint had been filed by Appellees. (A. 5.)

Both of these theories have little relevance in the case herein. Ordinarily, the effort of the state officials to halt the federal proceedings, and to relegate the federal plaintiff to state proceedings, is premised on the view that the constitutional validity of the state statute will be determined in the state proceedings, and that the needs of the federal plaintiff will therefore be answered. In this case, however, the state courts have authoritatively decided that the state statute is constitutional. Thus, the Appellees lack an adequate remedy in the state courts for vindication of their federal claims. The Appellees here cannot obtain an effective remedy or substantial justice in the state courts.

In the abstract, there is no sound reason why a federal plaintiff, who has no prosecution pending against him, should be denied a hearing by a federal court. To tell such a federal plaintiff that the constitutionality of the state statute eventually will be determined in the state proceedings does not appear sufficient. The federal plaintiff has no right to intervene in the pending state case and present his own arguments as to the constitutionality of the law involved. The defendant in the pending state case may not necessarily raise constitutional issues as part of his de-

fense; he may be acquitted on other grounds; or he may decide not to appeal his conviction. Denying relief to a federal plaintiff compels him to depend for vindication of rights on a proceeding over which he has no influence, or else to endure long delays until a conclusion of all state proceedings, so that he can then start his own federal suit. Moreover, as in the case herein, it is inaccurate to assert that the interests of the theatre employees and the interests of the Appellees are the same or similar. The Complaint states that the Appellee Miranda is the owner of the land where the theatre is located, and the Appellee Pussycat Theater Hollywood is a California corporation engaged in the business of operating a motion picture theatre on the same property. The interests of the owner of the property and the operator of the theatre are in many respects diverse from those of the theatre employees. The right of these Appellees not to be arbitrarily deprived of their liberties and properties without due process of law has a broader and more distinctive scope than those employed temporarily in the theatre. See, *Heller v. New York*, 413 U.S.483; *Lynch v. Household Finance Corp.*, 405 U.S.538.

The contention that a state action may be deemed "pending" if the federal plaintiff is arrested or indicted after the federal complaint is filed also appears untenable. Such an approach would provide a ready device for state prosecutors to remove from the federal to the state court the litigation of constitutional claims made by the federal plaintiff. Such a device could frustrate federal jurisdiction, penalize the plaintiff for having brought the federal action, or chill others from engaging in conduct which the state prosecutors question. If the filing of federal actions are quickly followed by

state prosecutions, potential plaintiffs would not bring declaratory actions for fear of prosecution, and the principles of *Steffel* could be violated. In *Steffel,* the Court stated that requiring the federal courts totally to step aside when no state criminal prosecution is pending against the federal plaintiff would turn federalism on its head. To allow the State to force the same result and defeat the paramount role which Congress has assigned to the federal courts to protect constitutional rights would also have the same effect. Moreover, in the case herein, the District Court found "that the institution of the criminal proceedings was in retaliation for the attempt by plaintiffs to have their constitutional rights judicially determined in ths court". (A.123.) The misdemeanor complaint was filed only against the theatre employees. When the Appellees here filed their complaint on November 29, 1973, in the United States District Court, they also at the same time requested a temporary restraining order which was opposed by appellants. At least six weeks before the amendment of the misdemeanor complaint to include these Appellees, Appellants already knew the federal complaint had been filed. The effort to deprive the federal court of jurisdiction was manifest. *Zwickler v. Koota,* 389 U.S.241; *Samuels v. Mackell,* 401 U.S.66, 73-74; *Steffel v. Thompson,* 415 U.S.452.

D. In the light of the foregoing, it is submitted that the District Court correctly held that the strict requirements of *Younger* were only of "tangential relevance" to the issues involved in the case. (A. 123.) Nevertheless, the record establishes that the prosecutors and police in this case employed a scheme of harassment in bad faith to discourage the exercise of First Amendment rights. The objective criteria for determining bad

faith official activity under the aegis of a challenged statute were abundantly satisfied. Moreover, not only was there proof of great irreparable harm from official lawlessness, but the case also presents the "extraordinary circumstances" in which the irreparable injury is shown. *Younger v. Harris,* 401 U.S.37, 53. As aforestated, in this case the state courts have upheld the challenged law, and therefore the likelihood of great and immediate irreparable injury could not have been eliminated in the criminal prosecution pending against the theatre employees.

The record in this case abundantly demonstrates that the prosecuting officials and the police entered into an agreement, tacit or otherwise, that the motion picture film would not be shown in the City of Buena Park, County of Orange, State of California. The repeated seizures of copies of the motion picture film infringed on the ability of Appellees to show the motion picture to a substantial number of customers. It was equivalent to multiplying the seizure by the number of seats available in the theatre on each day of the seizure. The objective of the officials was suppression; the means used to attain the unlawful objective were harassment and bad faith enforcement. These were the findings of the District Court, and such findings were clearly not erroneous. See, *Duncan v. Perez,* 445 F.2d 557 (5 Cir. 1971), cert. den. 404 U.S.940; *Krahm v. Graham,* 461 F.2d 703 (9 Cir. 1972); *Shaw v. Garrison,* 467 F.2d 113 (5 Cir. 1972), cert. den. 409 U.S.1024; *McGuire v. Roebuck,* 347 F.Supp. 1111 (D.C. Tex. 1972); *Montgomery County Board of Education v. Shelton,* 327 F.Supp. 811 (D.C. Miss. 1971).

In *Heller v. New York,* 413 U.S.483, 93 S.Ct.2789, 2793-2794, the Court held that the film in that case

"was not subjected to any form of 'final restraint', in the sense of being enjoined from exhibition or threatened with destruction. A copy of the film was temporarily detained in order to *preserve it as evidence.* There has been no showing that the seizure of a copy of the film precluded its continued exhibition". The Court added that "seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding, . . ." (Court's emphasis). The Court emphasized in *Heller* that repeated seizures of films to prevent their exhibition adversely affected First Amendment interests. Moreover, in *Roaden v. Kentucky,* 413 U.S.496, 93 S.Ct.2796, 2801, the Court observed that seizures of films may be "unreasonable" under the Fourth Amendment because "prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. The setting of the book store or the commercial theater, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is 'unreasonable' in the light of the values of freedom of expression".

Here, there were initially four multiple seizures of the single film within two days after the theatre began to exhibit the film. (Appendix "A" to Jurisdictional Statement, pp. 1-5.) Each seizure was accompanied by the seizure of cash receipts at the theatre. On June 4, 1974, the District Court entered its judgment requiring the return of the seized property to the appellees. (Appendix "A" to Jurisdictional Statement. p. 21.) Thereafter, appellants seized seven additional copies of

the same motion picture film. [Findings of Fact and Conclusions of Law, September 5, 1974, Appendix "B" hereto.] Appellants cannot claim that these seizures were lawful in the light of the principles enunciated in *Heller, Roaden, Marcus* and *One Quantity of Books.* The claim that the copies of the film were "different" was patently unfounded, and the three-judge District Court so found in its initial ruling and in its supplemental opinion. (Appendix "A" to Jurisdictional Statement, pp. 1-5; A. 129.) On January 29, 1974, the prosecutor stipulated that the four copies seized were in all respects identical. (A. 75-79.) The repeated use of a single form in the various affidavits in support of the search warrants, which spoke of an "additional act of sexual intercourse" and "numerous small changes at different portions of the film" (Appendix "A" to Jurisdictional Statement, pp. 3-4), was a plain subterfuge by the appellants to circumvent the rulings in *Heller* and *Roaden.* If there were any "small changes", they were never particularized, nor was there ever any statement of how much additional time was consumed in these alleged differences or whether the officers merely saw additional details in their repeated viewing of the same film.

California Penal Code §1538.5 is the principal statute governing motions for return of property or suppression as evidence on the grounds of an illegal search and seizure. The statute specifically provides that if the property or evidence relates to a misdemeanor complaint, the motion shall be made in the Municipal Court before trial. §1538.5(g). Both the People and the defendant have a right to appeal any decision of the Municipal Court relating to the motion for return or suppression to the Superior Court of the County in which

the Municipal Court is located. Aside from appellate review of orders granting or denying motions for return or suppression, the Superior Court has no jurisdiction in search and seizure proceedings involved in misdemeanor prosecutions. The motion for return or suppression is heard by the magistrate who issued the search warrant. §1538.5(b). When an officer takes property under a search warrant, all property or things seized must be retained by the officer in his custody. California Penal Code §1536. In California the seizure of alleged obscene material under a search warrant must be followed immediately by an adversary proceeding to justify the seizure. The issue of obscenity is not presented in such adversary proceedings. The only issue is whether there existed probable cause for the issuance of the search warrant. "It should be emphasized that in applying these principles here we are concerned only with probable cause, not with the final determination as to the character of the named books or the guilt of petitioners." *Aday v. Superior Court,* 55 Cal.2d 789, 362 P.2d 147, 13 Cal.Rptr. 415, 421; *Aday v. Municipal Court,* 210 Cal.App.2d 229, 26 Cal.Rptr. 576. See, *Blount v. Rizzi,* 400 U.S.410, 420. The legislature of the State of California has chosen only one method for the determination of the alleged obscenity of material, and that is in criminal proceedings before a jury. California Penal Code §§311-313.5. Only upon the conviction of an accused, and only when a conviction becomes final, can obscene material in the possession of law enforcement officials or the court be suppressed or destroyed. California Penal Code §312.

In the case herein, official lawlessness is made manifest by the disregard of state statutory provisions and by the circumvention of governing law through the im-

provisation of unauthorized proceedings denominated with the talismanic label of "adversary proceedings", which were in actuality injunctive prior restraints authorizing the suppression of all copies of a motion picture film. The actions of the officials were not only lawless, but a deliberate attempt to circumvent the principles enunciated in *Marcus v. Search Warrants, One Quantity of Books v. Kansas, Heller v. New York,* and *Roaden v. Kentucky.* Application for search warrants were made to a Judge of the Municipal Court of a judicial district other than the judicial district in which the theatre is located. Contrary to law, the seized property was turned over to the Judge at his home, the obvious purpose being to frustrate any order of the federal court directing return of the seized copies of the film. (A. 37, 41, 129-130.) Instead of proceeding in the Municipal Court, the Appellants here obtained an order from a Judge of the Superior Court restraining any further exhibition of the motion picture film pending hearing on an order to show cause why all of the copies of the film should not be ordered seized as contraband. (A. 64-65.) At the time this restraining order was obtained, the Superior Court Judge had not even seen the film. (A. 73.) Thus, the proceedings before the Superior Court were not an "adversary proceeding" seeking to justify the prior seizure of the four copies of the film. On the contrary, this was an improvised procedure commencing with a prior restraint and seeking to suppress all copies of the film in the future. No provision in law exists for such a procedure. No complaint was ever filed and no action was ever commenced. Nevertheless, the Judge of the Superior Court proceeded to have a so-called hearing and pronounced the film obscene "beyond any reason-

able doubt". There was palpably no jurisdiction in the Court to make any such determination. The colloquy before the Superior Court Judge clearly establishes that the sole intent of the proceedings was to evade governing law and to suppress the motion picture film. (A. 68-74.) As counsel for Appellees correctly stated:

> "The People have filed a criminal prosecution; that is their remedy under the laws of the State of California, there is no corresponding civil remedy to enjoin the exhibition of the film to seize all copies of the film or to declare it obscene. . . .
>
> "Now, all I have before me is an Order to Show Cause without a proceeding; there is not even a complaint, not even a complaint [on] file in the Superior Court.
>
> "Now, where does the Superior Court have jurisdiction to enter a temporary restraining order where there is not even a case pending before the Superior Court?" (A. 68-69.)[15]

The findings and conclusions of the District Court were based upon a record which unmistakably demonstrated an intentional plan of harassment by prosecuting officials and police officers for the purpose of denying Appellees' First Amendment rights. Harassment and bad faith enforcement and the resultant great ir-

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[15]The State has rejected attempts to vest jurisdiction in the Superior Court to entertain actions seeking injunctions against the sale or distribution of books, magazines, motion picture films, or any other articles alleged to be obscene. A proposed initiative measure was rejected in 1972. (A copy of the proposed initiative measure is contained as Appendix B to the Supplemental Memorandum of Points and Authorities in Support of Temporary Restraining Order and Order to Show Cause filed December 3, 1973). (R. 137.) Subsequent attempts in the state legislature to vest such jurisdiction in the Superior Court have all failed.

reparable harm were plainly established. Moreover, this is not a case of balancing the importance of the claims to federal court protection of constitutional rights against the interest of the State in being the decider in the first instance. In this case the state courts had made their determination with respect to the constitutionality of the statute, and it was thus plain that Appellees could not obtain adequate protection in state proceedings.

E. Two briefs have been submitted on behalf of Appellants, the first on behalf of the District Attorney of the County of Orange, and the other on behalf of the Attorney General of the State. On the issues of abstention and comity, most of the arguments advanced by the Appellants have been answered in the foregoing discussion. The District Attorney's brief (pp. 34-45) relies on the theory of "imputing" the existence of state criminal proceedings to these Appellees on the basis of the prior criminal prosecution instituted against the theatre employees, and in the alternative, that the subsequent amendment of the criminal proceedings to include the Appellees also resulted in a "pending" prosecution which deprived the federal court of jurisdiction. Principal reliance is placed upon *Allee v. Madrano,* 94 S.Ct.2191. The District Court below, referring to the opinion of Chief Justice Burger in *Allee,* pointed to the fact that the Chief Justice stated "that inferences of bad faith can arise from the common activity of the prosecutors and the police, inferences that the state may have had reasons for bringing a prosecution other than an expectation of securing a valid conviction". (A. 122-123.) The District Court held that the later criminal charges brought in the case herein were added justification for action by the Dis-

trict Court. The District Court concluded "that the institution of the criminal proceedings was in retaliation for the attempt by plaintiffs to have their constitutional rights judicially determined in this court". (A. 123.)

The District Attorney (Br., pp. 53-66) attempts to invoke *Younger* and *Perez,* contending that there was an "absence of harassment". The Appellants do not dispute the stipulation made in the criminal proceedings that the four copies of the motion picture film were identical. There is no question that the record shows that they were so treated in actuality by the Appellants. The Appellants concede that "it is true" (Br., p. 54) that an *ex parte* restraining order was obtained against further showing of the film. Stress is placed upon the term "adversary proceeding", but there is not the slightest substantiation for the contention that the proceedings in the Superior Court had any support in law. It is urged that a jury trial is not necessarily required in an obscenity prosecution, but this contention is irrelevant in the context of the case herein. Appellees' point is that there were repeated seizures in violation of *Heller;* prior restraining orders obtained *ex parte* by a judge who had no jurisdiction and who had never seen the film; followed by seven more seizures of copies of the same film. The argument that the District Court lacked jurisdiction because the complaint sought "recovery of property in the custody of a state court" (pp. 67-68) is without merit under both state and federal law. See, California Penal Code §1536; *Cinema Classics, Ltd. v. Busch,* 339 F.Supp. 43 (C.D. Cal. 1974), aff'd. 409 U.S. 807.

The cases cited by the District Attorney (Br., p. 55) were all decided before *Heller v. New York.* They are

random decisions where the factual circumstances are in no way akin to those presented in the record here. They involve cases dealing with burglary, contempt proceedings, searches in homes, malicious mischief, habeas corpus proceedings involving detainers of prisoners, coercions by officials of a plea of guilty, and other like proceedings. The decision in *Wilhelm v. Turner,* 298 F.Supp. 1335, affirmed 431 F.2d 177, cert. den. 401 U.S.947, does not aid Appellants, either on the law or the facts. The case here does not involve the issue of official immunity in damage actions brought under the Civil Rights Act. This is a case of repeated seizures of copies of a single motion picture film, in violation of the First and Fourteenth Amendments, and the intentional suppression of the exhibition of the motion picture film under procedures unauthorized by state law, in violation of federal law, and in violation of the federal Constitution.

The Attorney General's brief argues for abstention (pp. 21-33) on similar grounds. In an attempt to create a "pending" prosecution prior to the filing of the federal complaint, the brief argues that the improvised procedure in the Superior Court was akin to a criminal prosecution, on the theory that such proceeding is of "a quasi-criminal nature, intended as an equitable remedy against criminal conduct". No attempt is made to support the legality of these procedures, and it should be noted that the two cases relied upon by the Attorney General in this connection involved state proceedings authorized by statute. See, *Maseo v. Cannon,* 326 F.Supp. 1315 (D.C. Wis. 1971); *McCue v. City of Racine,* 330 F.Supp. 466 (D.C. Wis. 1971). (Br., pp. 23-24.) The contention that the proceeding before the Superior Court was somehow a "quasi-criminal"

procedure is without merit. The brief argues, contrary to the argument that was made by Appellants before the District Court (Appendix "A" to Jurisdictional Statement, p. 8), that *Enskat* does not necessarily represent the settled law in California (pp. 24-25). In the light of the denial of hearing in *Enskat* by the California Supreme Court and the subsequent proceedings, it is submitted that this argument ignores reality. The District Court rightly observed, and indeed the Appellants argued before the District Court, that the California decisions make it clear that the judgment rendered by the Court of Appeal in *Enskat* is binding upon all of the Superior and Municipal Courts of the State. Denial of hearing by the California Supreme Court stands as a decision of a court of last resort in California until and unless disapproved by the California Supreme Court or until change of the law by legislative action. (Appendix "A" to Jurisdictional Statement, p. 8.)

In attempting to urge the argument that the state prosecution was "pending" because of the alleged "identity of interest" between the theatre employees and Appellees, the Attorney General reveals an anomalous position. It is argued that since the films which were seized and which were the object of the criminal prosecution against the theatre employees were subject to the provisions of California Penal Code §312, to wit, that "upon the conviction of the accused, the court may, when the conviction becomes final", order the material in the possession or control of the District Attorney or any law enforcement agency to be destroyed, it follows that the Appellees' ownership of the films "involved them in the ongoing state criminal action", and that the direction to return the three copies of the

film constituted an "unwarranted intrusion and intervention in a valid ongoing state prosecution". (Br., pp. 25-27.) While conceding that it was true that a stipulation had been agreed to that all of the seized copies were identical, still it is urged that once returned to appellees, the other copies of the film "would be beyond the reach of the state court". (Br., p. 28.)

The aforesaid arguments are not only contradictory, but they reveal the basis for the findings and conclusions of the District Court. There is no attempt made to justify the state proceedings; yet these proceedings are urged as a device for depriving the said court of federal jurisdiction. It is conceded that the only existing legislation requires the institution of criminal proceedings, with the sole justification for suppression only following conviction and final affirmance of such conviction. It is conceded that the State will at all times have possession of a copy of the film to support the criminal prosecution, and yet it is urged that *Heller* and the First Amendment should be disregarded because if a conviction is obtained and finally affirmed, the additional copies may not be available for destruction.

The arguments by the Attorney General with respect to the "race to the courthouse" (pp. 30-31) have been previously anwered. The brief attempts to impale Appellees on the horns of a dilemma; there is, however, a third way out. It is urged that if the authorities determined not to prosecute Appellees, then Appellees would lack standing. However, the authorities did decide to prosecute, and standing cannot now be denied. It is then urged that if the state authorities initiate prosecution, Appellees "would be presented with a state court forum which justifies abstention" (Br., p. 30.) How-

ever, as has heretofore been demonstrated, the state forum was no longer available to vindicate Appellees' constitutional rights, and abstention was therefore not justified. Reliance upon the initial order of Judge Lydick is misplaced. This was merely an application initially made for a temporary restraining order by Appellees. Judge Lydick did not have the benefit of subsequent evidence before the three-judge court which demonstrated that the films were not different but were, in fact, identical, both by stipulation and by the treatment of the films by the Appellants.

IV

The District Court Correctly Held That the California Obscenity Statute, as Interpreted by the State Courts of California, Fails to Meet the Constitutional Standards Mandated by the Court in Miller v. California, 413 U.S.15.

A. In *Miller v. California,* 413 U.S.15, this Court sought to reduce the admitted chaos permeating the law of obscenity. The Court spoke of "the intractable obscenity problem" and quoted Justice Harlan's observation in *Interstate Circuit, Inc. v. Dallas,* 390 U.S.676, 704-705, that the law of obscenity had brought forth "a variety of views among members of the Court unmatched in any other course of constitutional adjudication [footnote omitted]." In *Miller,* the Court recognized what everyone connected with obscenity law had known for years—that under the original formulation of *Roth v. United States,* 354 U.S.476, and the "three-pronged" plurality approach of *Memoirs v. Massachusetts,* 383 U.S.413, it had been impossible to know with any adequate degree of certainty whether publications dealing with sex would be afforded constitu-

tional protection under the First Amendment or condemned as obscene. In view of the acknowledged unworkability of the *Roth-Memoirs* test, the Court was forced to adopt the "casual practice" of *Redrup v. New York,* 386 U.S.767. As Chief Justice Burger stated:

> "this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. *Redrup v. New York,* 386 U.S.767 . . . Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the *Redrup* 'policy'. See *Walker v. Ohio,* 398 U.S. 434, 435 . . . (dissenting opinions) (1970). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us." *Miller v. California,* 413 U.S. at 22, n.3.

Justice Brennan, dissenting in *Paris Adult Theatre I v. Slaton,* 413 U.S.49, 82, made the same point, saying: "In the face of this divergence of opinion the Court began the practice in 1967 in *Redrup v. New York,* 386 U.S.767, of *per curiam* reversals of convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, deemed not to be obscene." After stating that the Court had failed to formulate a satisfactory standard for separating protected from unprotected speech, Jus-

tice Brennan went on to say that out of necessity the Court

> "resorted to the *Redrup* approach, which resolves cases as between the parties, but offers only the most obscure guidance to legislation, adjudication by other courts, and primary conduct. By disposing of cases through summary reversal or denial of certiorari we have deliberately and effectively obscured the rationale underlying the decision. It comes as no surprise that judicial attempts to follow our lead conscientiously have often ended in hopeless confusion." (413 U.S. at 83.)

In *Miller*, the Court concluded that a continuance of this condition, of extreme vagueness in the line separating protected from unprotected speech, was constitutionally intolerable because of the lack of fair notice to those who produce and circulate sexually related publications, and the absence of concrete guidelines for prosecutors and courts.

The explicit premise of the revised test which the Court adopted in *Miller* was that this new test—unlike *Roth, Memoirs* and *Redrup*—would bring about clarity in obscenity law.

In *Miller*, the Court stated that "in the area of freedom of speech and press the courts must always remain sensitive," (413 U.S. at 22-23), and acknowledged "the inherent danger of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See *Interstate Circuit, Inc. v. Dallas*, 390 U.S.676, 682-685." (413 U.S. at 23-24.) In *Interstate Circuit*, the Court discussed with approval *Winters v. New York*, 333 U.S.507, where the Court struck down as vague and

indefinite a standard pursuant to which publications were condemned if they contained "criminal news or stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting violent and depraved crimes." In *Interstate Circuit,* the Court also cited with approval *Burstyn v. Wilson,* 343 U.S.495; *Gelling v. Texas,* 343 U.S.960; *Superior Films, Inc. v. Dept. of Education,* 346 U.S.587; *Commercial Pictures Corp. v. Regents,* 346 U.S.587; *Holmby Productions, Inc. v. Vaughn,* 350 U.S.870; and *Kingsley Int'l. Pic. Corp. v. Regents,* 360 U.S.684. These cases had condemned as unconstitutionally vague the following standards:

> "Sacrilegious," which was found to have such an all-inclusive definition as to result in "substantially unbridled censorship."
>
> "Of such character as to be prejudicial to the best interest of the people of the city."
>
> "Morally educational, or amusing and harmless."
>
> "Immoral" and "tend to corrupt morals."
>
> "Approve such films . . . [as] are moral and proper; . . . disapprove such as are cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals."
>
> "Unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime . . ."

In *Interstate Circuit,* the Court approved Justice Clark's concurring remarks in *Kingsley Int'l. Pic. Corp. v. Regents,* 360 U.S. at 701, where he stated:

> "The only limits on the censor's discretion is his understanding of what is included within the term

'desirable, acceptable or proper.' This is nothing less than a roving commission in which individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law. . . ."

In an attempt to make the obscenity laws more precise, *Miller* held that statutes designed to regulate obscene materials must be confined to works which depict or describe sexual conduct specifically defined by the applicable state law as written or authoritatively construed. (413 U.S. at 23-24.)

Subsequently, the Court said that under

"the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice." (413 U.S. at 27).

Addressing himself to this specificity requirement, Justice Brennan, dissenting in *Paris Adult Theatre I v. Slaton,* 413 U.S.49, stated that when an obscenity statute failed to contain the required descriptions of prohibited sexual conduct the statute could not stand.

"For under the Court's restatements, a statute must specifically enumerate certain forms of sexual conduct, the depiction of which is to be prohibited. It seems highly doubtful to me that state courts will be able to construe state statutes so as to incorporate a carefully itemized list of various forms

of sexual conduct, and thus to bring them into conformity with the Court's requirements. Cf. *Blount v. Rizzi*, 400 U.S. 410, 419 (1971). The statutes of at least one State should, however, escape the wholesale invalidation. Oregon has recently revised its statute to prohibit only the distribution of obscene materials to juveniles or unconsenting adults." (413 U.S. at 95, n.13).

Chief Justice Burger recognized the force of Justice Brennan's views but did not think that *all* States other than Oregon would have to enact new obscenity statutes. "Other existing state statutes, as construed heretofore or hereafter may well be adequate." (413 U.S. at 24, n. 6). In discussing the kind of statute he had in mind, the Chief Justice pointed to Oregon and Hawaii statutes "as examples of state laws directed at depiction of defined physical conduct, as opposed to expression." (*Id.*)

B. In California, the Legislature has specifically defined obscenity, using the *Roth-Memoirs* test—a test this Court discarded as "unworkable." In *Zeitlin v. Arnebergh*, 59 Cal.2d 901, 31 Cal.Rptr. 800, the California Supreme Court traced the legislative history of California's "utterly without redeeming social value" test and concluded that it was essentially the equivalent of the "hard core pornography" test.[16] "By employing the term 'utterly', the Legislature indicated its intention to give legal sanction to all material relating to sex

[16]In *Redrup v. New York*, 386 U.S.767, 770, the Court stated that the "hard core pornography" test is similar to the *Memoirs* "utterly without redeeming social value" test.

except that which was *totally* devoid of social importance. The only material that falls into the latter category is hard core pornography." (59 Cal.2d at 920, 31 Cal.Rptr. at 812-813) (Emphasis in original). Even as *Zeitlin* spoke of hard core pornography, it recognized the difficulty of "identifying and delimiting" that elusive concept. "[W]e are in an area where the recourse to verbal descriptions is ultrahazardous." (59 Cal.2d at 918, 31 Cal.Rptr. at 811, n.25.)

After the *Miller* decision, the California Court of Appeal in *People v. Enskat*, 33 Cal.App.3d 900, 109 Cal.Rptr. 433 (hearing denied October 23, 1973, cert. den. 94 S.Ct.3225 [July 25, 1974]), examined the California obscenity statute to see if it met the constitutional standards required by the First and Fourteenth Amendments. *Enskat* recognized, of course, that the California statute defines obscenity in *Roth-Memoirs* language and does not contain specifically enumerated forms of sexual conduct, the depiction of which may be prohibited as obscene. *Enskat* made no attempt to read specific sexual conduct into the California statute, observing that, in California, that was a legislative, rather than a judicial, function. 33 Cal.App.3d at 901, 109 Cal.Rptr. at 440. *Enskat* cited with approval *In re M*, 9 Cal.3d 517, 520, 108 Cal.Rptr. 89, 92, where the California Supreme Court stated that courts may not "invade the province of the Legislature by redefining the elements of the underlying crime." *Enskat* also cited with approval *In re Brown*, 9 Cal.3d 612, 624, 108 Cal.Rptr. 465, 472 (1973), where the California

Supreme Court stated "In California all crimes are statutory. . . . Only the Legislature and not the courts may make conduct criminal." See also, *In re Lynch*, 8 Cal.3d 410, 414, 105 Cal.Rptr. 217, 219 (1972), where the California Supreme Court said:

> "We approach this issue with full awareness and respect for the distinct roles of the Legislature and the courts. . . . . We recognize that in our tripartite system of government it is the function of the legislative branch to define crimes . . . and that such questions are in the first instance for the judgment of the Legislature alone."

Because *Enskat* recognized that California courts are not free to engage in judicial legislation, it turned to pre-*Miller* California decisions to see if those cases had given the California obscenity statute the requisite specificity mandated by *Miller*.

> "[W]e pause but briefly with appellant's contention that §311 has not been authoritatively construed in the past so as to limit its reach to specifically defined sexual conduct. The contention is incorrect. . . . *Miller* states that [the sexual conduct] must be 'specifically defined by the applicable state law.' Previous California cases have so limited section 311. Thus it is clear that section 311 prohibits only 'hard core pornography' (Zeitlin v. Arnebergh, 59 C.2d 901, 31 Cal.Rptr. 800), that nudity does not equate with obscenity and that 'no matter how ugly or repulsive the presentation, we are not to hold nudity, absent a sexual activity, to be obscenity' (People v. Noroff, 67 Cal. 2d 791 at 797, 63 Cal.Rptr. 575 at 579) and that 'To constitute obscenity . . . the material must contain a graphic description of sexual activity'

> (People v. Cimber, 271 C.A.2d Sup. 867, 869, 76 Cal.Rptr. 282, 283). Further . . . Landau v. Fording, 245 C.A.2d 520, 54 Cal.Rptr. 177, states with reference to a film depicting . . . fellatio, sodomy and oral copulation that 'It should be readily apparent from the preceding description that the film goes far beyond customary limits of candor in offensively depicting certain unorthodox sexual practices and relationships. . .' (245 C.A. 2d at 826, 54 Cal.Rptr. at 181)." (Footnotes omitted) (33 C.A.3d at 909, 910, 109 Cal.Rptr. at 438-439).

Enskat impliedly recognized that the cases it cited did not give the statute the requisite specificity. It concluded, however, that California law required less concreteness than that called for in *Miller* because California retained the *Memoirs* "utterly without redeeming social value" test. *Enskat* concluded that it was only because this Court eliminated the *Memoirs* value test that it enunciated the new specificity standards. "[L]anguage in *Miller* itself indicates that the intent of the Court was only to require increased specificity in the state laws if the 'utterly without redeeming social value' test was abandoned." (33 Cal.App.3d at 911, 109 Cal.Rptr. at 440.)

C. The District Court did not consider the validity of the California obscenity statute until after it gave the California courts full opportunity to test its statute against the federal constitutional requirements this Court announced in *Miller*. Only after the California courts found that the statute as authoritatively construed did not violate the Constitution did the District Court exercise its constitutional duty and examine the statute to

determine whether it violated the guarantees of the First and Fourteenth Amendments.

The District Court interpreted *Miller* as this Court's first attempt to adopt a Due Process fair notice rule in the "long struggle to define that obscenity which is outside the protection of the First Amendment." (Appendix "A" to Jurisdictional Statement, p. 10.) The District Court below stated that *Enskat* "impliedly conceded that the statute as written does not meet *Miller*" but thought "that the statute [had] been authoritatively construed in the past so as to limit its reach to specifically defined sexual conduct." (Appendix "A" to Jurisdictional Statement, p. 11.) After noting the four cases *Enskat* relied on to find the requisite authoritative construction (*Zeitlin v. Arnebergh*, 59 Cal.2d 901, 31 Cal.Rptr. 800 (1963); *People v. Noroff*, 67 Cal.2d 791, 63 Cal.Rptr. 575 (1967); *People v. Cimber*, 271 Cal.App.2d Sup. 867, 76 Cal.Rptr. 382 (1961); and *Landau v. Fording*, 245 Cal.App.2d 820, 54 Cal. Rptr. 177 (1966)), the District Court stated:

> "The analysis of those cases that emerges in *Enskat* is that: (1) only 'hard core pornography is prohibited' (2) nudity, absent a sexual activity is not obscenity; and (3) the material must contain a 'graphic' description of sexual activity." (Appendix "A" to Jurisdictional Statement, p. 12.)

The District Court below concluded that none of the state court opinions attempted to delineate standards of obscenity based on specific conduct and held that the statute as authoritatively construed clearly failed to meet the "fair notice" and "concrete guidelines" tests of *Miller*. The District Court stated that the "hard core pornography" test relied on in *Enskat* is no more precise than the term "obscenity". (Appendix "A" to

Jurisdictional Statement, p. 12.) The Court referred to *Jacobellis v. Ohio,* 378 U.S.184, 201, where Chief Justice Warren stated:

> "We are told that only 'hard core pornography' should be denied the protection of the First Amendment. But who can define 'hard core pornography' with any greater clarity than 'obscenity'? And even if we were to retreat to that position, we would soon be faced with the need to define that term just as we now are faced with the need to define 'obscenity.' "

In *United States v. Alexander,* 428 F.2d 1169 (8 Cir. 1970), the Court of Appeals rejected the argument of the Government that an adversary proceeding prior to seizure was not required "where the publications or films are patently obscene or 'hard core pornography.' " (428 F.2d at 1174). Quoting from the Supreme Court's decision in *Marcus v. Search Warrants of Property,* 367 U.S.717, the Court declined to accept a line drawn by the Government between "hard core pornography" and protected speech as being any brighter than "that between mere obscenity and protected speech" (428 F.2d at 1174). The Court of Appeals stated that "the assumption that there is a consensus among reasonable men as to the identity of 'hard core pornography,' therefore diminishing the danger of suppressing protected speech, may be questioned." (428 F.2d at 1174, n.7). In *Haldeman v. United States,* 340 F.2d 59, 62, n.6 (10 Cir. 1965), Judge Pickett, referring to the term "hard core pornography," stated:

> "The writer of this opinion . . . felt that he would 'know it when he saw it' but a reading of some of the published material held to be constitutionally protected tends to raise doubts regarding one's perceptive abilities in such matters."

In *People v. Adler*, 25 Cal.App.3d Sup. 24, 42, 101 Cal.Rptr. 726, 738 (1972), Judge Goldberg, dissenting, said:

> "[T]he expression 'hard core pornography' is as elusive as 'obscenity'. . . . [I]n United States v. West Coast News Co. (6 Cir. 1966), 357 F.2d 855, 858, the court reviewed a collection of trash similar to that confronting us and upheld the conviction, saying: 'We know hard core pornography when we see it.' In one of its three-line *per curiam* opinions that became commonplace in obscenity cases the Supreme Court said simply, 'reversed. Redrup v. New York . . .' Aday v. United States, 388 U.S. 447. It may be that 'hard core pornography' is no more than a 'personal obscenity divining rod.'"

In *Commonwealth v. Horton*, 310 N.E.2d 316, 324 (Mass. 1974) Justice Hennessey, concurring in the judgment of the Supreme Judicial Court of Massachusetts, striking down the Massachusetts obscenity law in light of *Miller*, stated that the phrase hard core pornography "is little more than a cliché which has not been defined in any case" and is insufficient to meet the specificity requirement.

That "hard core pornography" is as elusive a concept as "obscenity" is illustrated by the fact that the book "Tropic of Cancer" was found to be hard core pornography in New York (*People v. Fritch*, 13 N.Y. 2d 119, 192 N.E.2d 713 (1963), while California found that it was not hard core pornography (*Zeitlin v. Arnebergh*, 59 Cal.2d 901, 31 Cal.Rptr. 800 (1963).)

In addition to finding the "cliché" hard core pornography imprecise, the District Court also found that

the phrase "graphic description of sexual activity" relied on in *Enskat* does not meet the specificity test. The court found this general language to fall far short of what it understood this Court to mean when it stated in *Miller* that "We now confine the permissible scope of [obscenity] regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed." *Miller*, the District Court said, required specifically defined sexual conduct in the governing statute to comport with due process and to afford persons subject to the criminal obscenity statutes fair notice of what conduct is criminally proscribed. The court found that *Enskat*, and the cases cited therein, and other California cases brought to the court's attention, made no attempt "to formulate a standard of obscenity or a rule of law based upon those specific acts therein mentioned, or upon *any* specific acts." (Appendix "A" to Jurisdictional Statement, p. 13.) The court stated it was clear "that there can be 'sexual activity' which is utterly without redeeming social value which is so innocuous as to not be included on a list enumerated by a legislature. (Appendix "A" to Jurisdictional Statement, p. 14.)

The District Court also found constitutionally impermissible the argument made in *Enskat* that the retention in the California obscenity statute of the "utterly without redeeming social value" test dispensed with the due process specificity requirement set forth in *Miller*. The court found this argument to be "of questionable logic," and "particularly specious."

It should be remembered that in *Miller*, this Court stated: "We also reject as a constitutional standard the *ambiguous concept* of 'social importance.'" (413 U.S.

at 25, n.7.) (Emphasis added.) In *Miller*, the Court also wondered "if the 'utterly without redeeming social value' test had any meaning at all." (93 S.Ct. at 2613.) It is difficult to conceive how the "ambiguous" and "meaningless" "utterly without redeeming social value" test gives the necessary concreteness to the statute, if it otherwise fails to meet the *Miller* specificity requirement.

In holding the California statute unconstitutional, the District Court relied on a number of cases which had reached a similar result. (Appendix "A" to Jurisdictional Statement, n.2.) In *Commonwealth v. Horton*, 310 N.E.2d 316 (Mass. 1974), the Supreme Judicial Court of Massachusetts held that the Massachusetts obscenity statute failed to meet the *Miller* specificity requirement, and that its prior obscenity decisions had not authoritatively construed the statute in a way which has specifically defined the sexual conduct whose portrayal is barred by statute. "Our decisions . . . fall far short of the 'plain examples' given in the *Miller* opinion. . . . The most we have ever said was said in a negative way in a rescript opinion complying with what we viewed as the requirements of the Supreme Court of the United States. See *Commonwealth v. Donahue*, 358 Mass. 803 (1970) ("[n]one of the pictures, however, explicitly portrayed copulation or other sexual congress"). . . . The opinion in the *Donahue* case was not designed as an authoritative construction of our statute . . . so as to provide a definition of proscribed sexual conduct. The Court of Appeals for the First Circuit was correct in indicating in *Literature, Inc. v. Quinn*, 482 F.2d 372, 375 (1973), that this Court has not 'specifically defined' . . . those activities which under [the Massachusetts obscenity statute] may

not be depicted or described. It is therefore clear that the opportunity is not fairly available to us, as it was in certain other states . . . to conclude that the constitutional requirements of specificity have been met by our decisions previous to the *Miller* decision." (310 N.E.2d at 321.)

In *Louisiana v. Shreveport News Agency, Inc.*, 287 So.2d 464 (1973), the Louisiana Supreme Court found that the statute on its face did not comply with *Miller* and that the prior authoritative construction was not sufficient to bring it into compliance with *Miller*.

> ". . . [I]t must be obvious even to laymen and surely to this Court, that [the Louisiana obscenity statute] does not meet the guidelines and standards set forth by the United States Supreme Court in Miller v. California.
>
> "We are urged by the State, however, to take the two examples, which the Miller majority opinion suggests state legislatures might define for regulation of certain obscene materials, and to make them the obscenity statute for Louisiana. . . . We are not of the opinion that we are endowed with the constitutional authority to redraft Louisiana's obscenity statute. . . ." (287 So.2d at 468-469.)

In *Hamar Theatres, Inc. v. Cryan*, 365 F.Supp. 1312 (D.C. N.J. 1973), a three-judge court found the New Jersey statute unconstitutional in light of *Miller*. Thereafter, this Court noted probable jurisdiction. *Cryan v. Hamar Theatres, Inc.*, 94 S.Ct.1967 (April 22, 1974). On December 23, 1974, the case was vacated and remanded to the United States District Court for the District of New Jersey to determine whether the cause was

moot in light of *State v. De Santis*, 65 N.J. 462 (1974). 43 L.W. 3354.

In *State v. De Santis*, 65 N.J. 462, 323 A.2d 489 (1974), the New Jersey Supreme Court held that the statute on its face and as it was construed prior to *Miller* was unconstitutional. For the future, however, the New Jersey Supreme Court did what the California courts refuse to do, *i.e.*, gave it a saving construction. The New Jersey Court found that the statute "satisfied *Memoirs* but did not meet the specificity requirements of *Miller;* nor did our judicial precedents satisfy *Miller's* demand that the prohibited hard core sexual conduct be 'specifically defined by the applicable state law, as written or authoritatively construed.'" (323 A.2d at 494.) The court noted that its prior obscenity decisions had "consistently avoided . . . particularization in favor of more general prohibitory standards. [Citations omitted]." Finding that the statute as written "does not in literal terms satisfy *Miller,*" and that its prior construction of the statute failed to give it a saving authoritative construction, the court concluded that the statute "cannot withstand constitutional attack unless we now judicially salvage it by incorporating the *Miller* requirements." (323 A.2d at 494.)

See also, *New Hampshire v. Harding*, 320 A.2d 646 (1974); *State v. Welke*, 213 N.W.2d 641 (1974).

D. The Attorney General, relying on the statement in *Miller* that the Constitution does not require "God-like precision," argues that it is "unnecessary that to avert the constitutional infirmity of vagueness the statute must recite a detailed 'blueprint' of the proscribed conduct." (Br. p. 18.) It is the Attorney General's submission "that *Miller's* demand for specificity does

not require a detailed statutory enumeration and description of *all* of the types of sexual activity sought to be proscribed as obscene." *Id.*

The Attorney General, follows *Enskat* and construes the statute as reaching only "hard core pornography", *i.e.*, "graphic depictions of sexual activity" or "nudity with sexual activity" (Br. pp. 17-18.) So construed, the statute does not enumerate *any* specific form of sexual conduct, the depiction of which may be prohibited and does not specify whether the prohibited "sexual activity" prohibited includes or excludes simulated acts.

The District Attorney views the statute differently. As he sees it, the sexual conduct covered by the statute is limited to actual, and not simulated, acts of "sexual intercourse, masturbation, sodomy, bestiality, sadism, masochism and oral copulation." (Br., p. 74.) The acts must be "ultimate sexual acts" which "lead to a culmination, that is, to orgasm" (Br., p. 71.)

The disagreement between the Attorney General and the District Attorney as to the correct meaning of the statute stems from the fact that the statute as written is plainly unconstitutional under *Miller*, and the judicial construction is lacking in "concrete guidelines". As previously noted, *Enskat* and the cases it relied on spoke only in generalities. Those cases did not purport to enumerate a list of sexual acts the depiction of which is within the statute. The question involved in the two California Supreme Court cases cited by *Enskat* [*Zeitlin v. Arnebergh*, 59 Cal.2d 901, 31 Cal.Rptr. 800 (1963); and *People v. Noroff*, 67 Cal.2d 791, 63 Cal. Rptr. 575 (1967)] was whether the publications involved in those cases came within the restrictive limitations of the *Roth-Memoirs* test, which was incorporated

into the California obscenity statute. In each instance, the California Supreme Court found the publication not obscene. In *Zeitlin*, the court held that the book *Tropic of Cancer* was not "hard core pornography", without defining hard core pornography. In *Noroff*, the court found that the magazine did not contain "graphic depictions of sexual activity," without defining the terms "graphic depictions" or "sexual activity." In *Landau v. Fording*, 245 Cal.App.2d 520, 54 Cal.Rptr. 177, aff'd. 388 U.S.456 (1967), the homosexual activity found offensive consisted of suggested sexual acts "meaningfully omitted and thus by the very fact of omission emphasized". 54 Cal.Rptr. at 182. In *People v. Cimber*, 271 Cal.App.2d Supp. 867, 869, 76 Cal.Rptr. 382, 383 (1969), the court stated that the portrayal of sexual acts may be obscene although they are simulated rather than real. In *People v. Rosakos*, 268 Cal.App.2d 497, 74 Cal.Rptr. 34 (1968), a case not cited in *Enskat*, the court suggests that only "actual sex acts" can be found obscene.

A pre-*Miller* case which is at war with both the Attorney General's and the District Attorney's understanding of the statute is *People v. Andrews*, 23 Cal.App. 3d Sup. 1, 100 Cal.Rptr. 276 (1972). *Andrews* held that *Zeitlin* does not impose "any judicially created modification or limitation upon the tests of obscene material prescribed by *Roth* and Penal Code §311.2 by its references to 'hard core' pornography. . . ." 23 Cal.App.3d Sup. at 5, 100 Cal.Rptr. at 278. In *Andrews*, the court rejected the view that the test of whether photographs are obscene "is a mechanical one which is satisfied only when they explicitly show actual penetration or contact between the erogenous organs or

zones of the actors". The court recognized that its interpretation of the statute was "less specific and mechanical" than the interpretation urged upon it. 23 Cal. App.3d Sup. at 6, 100 Cal.Rptr. at 278.

The California statute, as written and as construed, is also ambiguous with regard to the different tests to be applied to textual works as opposed to pictorial works. Burt Pines, the City Attorney for the City of Los Angeles, concluded after *Miller* was decided, that *Kaplan v. California,* 413 U.S.115, notwithstanding, it was his view that the California obscenity statute could not reach publications which are entirely textual. Speaking before the 38th Annual Conference of the National Institute of Municipal Law Officers (October 21-24, 1973), City Attorney Pines stated:

> "I strongly believe that the communication of ideas entirely by the printed word . . . have some redeeming social value." (The Hollywood Reporter, 43rd Anniversary Edition, p. 79.)[17]

In an article appearing in the California State Bar Journal, entitled "The Obscenity Quagmire", Mr. Pines notes that the district attorneys of Sacramento County and San Francisco County have forgone further obscenity prosecutions. (46 Cal. St. Bar J. 509, 562 (1974).)

The upshot of all the confusion demonstrates, it is respectfully submitted, that the District Court was correct in concluding that the California statute, as writ-

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[17]Justice Brennan, dissenting in *Paris Adult Theatre I v. Slaton,* 413 U.S. at 100, observed that:

> "If the application of the 'physical conduct' test to pictorial material is fraught with difficulty, its application to textual material carries the potential for extraordinary abuse."

ten and construed, is not confined to regulating works which depict or describe specifically defined sexual conduct.

E. The District Attorney argues that in *Hamling v. United States*, 418 U.S.87, this Court "made clear that a construction similar to the construction in *Enskat* is constitutionally proper." (Br., p. 76.) In rejecting this argument when it was made to it, the District Court observed that this Court had construed the federal obscenity statute to include the specific sexual conduct described in *Miller*. *Enskat* did not construe the California statute as encompassing the specific conduct mentioned in *Miller*. The court stated that the dispositive answer to the District Attorney's argument is that "there is nothing in Hamling which would lead this Court to believe that the specificity requirements of *Miller* have been overruled. The tenets of *Miller* have not been met, either by the California statute on its face or as construed, either pre-*Miller* or in *Enskat*. There has been no construction by the California courts of an obscenity standard based upon specific acts, nor any formulation comparable to that added to the federal statute in *Hamling*." (A. 124.)

If, as the court below stated, and as Appellees believe, the *Miller* specificity requirement has not been overruled, the ruling of the District Court finding the California obscenity statute unconstitutional should be affirmed.

Conclusion.

For all the foregoing reasons, the appeal should be dismissed as not being within the jurisdiction of this Court. In the alternative, the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX A.

Additional Statute Involved.

California Penal Code.

§ 1538.5 [Motion for return of property or suppression as evidence: Special hearings: New complaint or indictment: Appeals: Review by mandate or prohibition: Stay of proceedings: Dismissal of action: Release of defendant: Bail: Motions based on freedom of speech or press.] (a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(1) The search or seizure without a warrant was unreasonable.

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; or (v) there was any other violation of federal or state constitutional standards.

(b) When consistent with the procedures set forth in this section and subject to the provisions of Section 170 through 170.6 of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant.

(c) Whenever a search or seizure motion is made in the municipal, justice or superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

(d) If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section or Section 1238 or Section 1466 are utilized by the people.

(e) If a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention. If the motion is granted at a special hearing, the property shall be returned upon order of the court only if, after the conclusion of any further proceedings authorized by this section or Section 1238 or Section 1466, the property is not subject to lawful detention or if the time for initiating such proceedings has expired, whichever occurs last. If the motion is granted at a preliminary hearing, the property shall be returned upon order of court after 10 days unless the property is otherwise subject to lawful detention or unless, within that time, further proceedings authorized by this section or Section 1238 are utilized; if they are utilized, the property shall be returned only if, after the conclusion of such proceedings, the property is no longer subject to lawful detention.

(f) If the property or evidence relates to a felony offense initiated by a complaint, the motion may be made in the municipal or justice court at the preliminary hearing.

(g) If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal or justice court before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure. If the property or evidence relates to a

misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.

(h) If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal, justice or superior court.

(i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing.

(j) If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new complaint or seek

an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an information, the people within 10 days after the preliminary hearing request in the superior court a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hearing for a period of time up to 30 days. If defendant's motion is granted at a special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why such evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o), unless the court prior to the time such review is sought has dismissed the case pursuant to Section 1385. If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a mo-

tion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which such inferior court is located, in accordance with the California Rules of Court provisions governing appeals from municipal and justice courts in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

(k) If the defendant's motion to return property or suppress evidence is granted and the case is dismissed pursuant to Section 1385, or the people appeal in a misdemeanor case pursuant to subdivision (j) the defendant shall be released pursuant to Section 1318 if he is in custody and not returned to custody unless the proceedings are resumed in the trial court and he is lawfully ordered by the court to be returned to custody.

If the defendant's motion to return property or suppress evidence is granted and the people file a petition for writ of mandate or prohibition pursuant to subdivision (o) or a notice of intention to file such a petition, the defendant shall be released pursuant to Section 1318 unless (1) he is charged with a capital offense in a case where the proof is evident and the presumption great, or (2) he is charged with a noncapital offense defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1 and the court orders that the defendant be discharged from actual custody upon bail.

(1) If the defendant's motion to return property or suppress evidence is granted, the trial of a criminal case shall be stayed to a specified date pending the termination in the appellate courts of this state of the proceedings provided for in this section, Section 1238, or Section 1466 and, except upon stipulation of the parties, pending the time for the initiation of such proceedings. Upon the termination of such proceedings, the defendant shall be brought to trial as provided by Section 1382, and subject to the provisions of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (o), the defendant shall be entitled to have the action dismissed if he is not brought to trial within 30 days of the date of the order which is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when such dismissal is upon the court's own motion and is based upon an order at the special hearing granting defendant's motion to return property or suppress evidence. In a misdemeanor case, the defendant shall be entitled to a continuance of up to 30 days if he intends to file a motion to return property or suppress evidence and needs this time to prepare for the special hearing on the motion. In case of an appeal by the defendant in a misdemeanor case from the denial of such motion, he shall be entitled to bail as a matter of right, and, in the discretion of the trial or appellate court, may be released on his own recognizance pursuant to Section 1318.4.

(m) The proceedings provided for in this section. Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

(n) Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the Federal and State Constitutions. Nothing in this section shall be construed as altering (i) the law of standing to raise the issue of an unreasonable search or seizure; (ii) the law relating to the status of the person conducting the search or seizure; (iii) the law relating to the burden of proof regarding the search or seizure; (iv) the law relating to the reasonableness of a search or seizure regardless of any warrant which may have been utilized; or (v) the procedure and law relating to a motion made pursuant

to Section 995 or the procedures which may be initiated after the granting or denial of such a motion.

(o) Within 30 days after a defendant's motion is granted at a special hearing in the superior court, the people may file a petition for writ of mandate or prohibition, seeking appellate review of the ruling regarding the search or seizure motion. If the trial of a criminal case is set for a date which is less than 30 days from the granting of a defendant's motion at a special hearing in the superior court, the people, if they have not filed such a petition and wish to preserve their right to file such a petition, shall file in the superior court on or before the trial date or within 10 days after the special hearing, whichever occurs last, a notice of intention to file such a petition and shall serve a copy of the notice upon the defendant. [1967 ch 1537 § 1; 1970 chs 1289 § 2, 1441 § 1.5.]

APPENDIX B.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

Vincent Miranda, et al., Plaintiffs, vs. Cecil Hicks, etc., et al., Defendants. No. 73-2775-F.

Filed: 9/4/74.

Plaintiffs' Motion for Preliminary Injunction having come on for hearing in the above-entitled Court, the Honorable WARREN J. FERGUSON, presiding; the Court having considered said Motion and all of the pleadings in support of and in opposition to said Motion; the same having been submitted to the Court for decision, and the Court being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I

On November 23, 1973 and November 24, 1973, officers of the Buena Park Police Department, pursuant to Search Warrants, seized four prints of the film "Deep Throat" from the Pussycat Theatre in Buena Park, California (hereinafter referred to as "the Theatre").

II

On January 29, 1974, hearing was held before the Honorable MAX V. ELIASON, Judge of the Municipal Court of the North Orange County Judicial District, State of California, the case of *People v. Bailey*, Case No. NM 73 06675, at which the District Attorney of Orange County and counsel for the defendants in that case and for Plaintiffs in this case appeared. The

District Attorney for Orange County stipulated with counsel that each of the four prints of "Deep Throat" seized on November 23, 1973, and November 24, 1973, were identical and that for purposes of the pending criminal case only one print of the film "Deep Throat" was necessary for the prosecution.

III

By Order entered June 4, 1974, this Court, in the instant case, ruled that the multiple seizures of the film "Deep Throat" which took place on November 23, 1973 and November 24, 1973, clearly demonstrated Defendants' bad faith and harassment, in furtherance of a course of action that, regardless of the nature of any judicial proceedings, would effectively eliminate the film "Deep Throat" from Buena Park, California.

IV

On July 28, 1974, two members of the Buena Park Police Department viewed the films "Deep Throat" and "Devil in Miss Jones" at the Theatre.

V

On July 29, 1974, one of the officers executed an Affidavit in Support of Search Warrant requesting a Search Warrant for the film "Devil in Miss Jones." On July 29, 1974, a Search Warrant was issued for the seizure of the film "Devil in Miss Jones." At approximately 5:25 P.M. on July 29, 1974, one print of the film "Devil in Miss Jones" was seized from the Theatre.

VI

On July 29, 1974, an Affidavit in Support of Search Warrant was executed by one of the officers requesting a Search Warrant for the film "Deep Throat." On July

29, 1974, a Search Warrant was issued for the seizure of the film "Deep Throat." At approximately 5:25 P.M. on July 29, 1974, one print of the film "Deep Throat" was seized from the Theatre.

VII

At approximately 2:30 P.M. on July 30, 1974, officers of the Buena Park Police Department seized a second print of the film "Deep Throat" from the Theatre without a Search Warrant but on the basis of a document styled "Order of Seizure After Adversary Hearing," signed by a judge of the Superior Court on November 28, 1973, in the case of *People v. Miranda, et al.*, No. M 2248.

VIII

At approximately 12:53 A.M. on July 31, 1974, officers of the Buena Park Police Department seized a third print of the film "Deep Throat" from the Theatre on the basis of the Search Warrant previously issued on July 29, 1974.

IX

On July 31, 1974, an officer of the Buena Park Police Department executed an Affidavit in Support of Search Warrant requesting another Search Warrant for the film "Devil in Miss Jones." On July 31, 1974, a Search Warrant was issued for the seizure of the film "Devil in Miss Jones." At approximately 12:55 P.M. on July 31, 1974, a second print of the film "Devil in Miss Jones" was seized from the Theatre.

X

On July 31, 1974, at an *ex parte* hearing, a judge of the Superior Court modified the document styled "Order of Seizure After Adversary Hearing," by add-

ing the words "the court hereby reaffirms and reissues this order on 31 July 74."

XI

At approximately 4:35 P.M. on July 31, 1974, officers of the Buena Park Police Department seized a fourth print of the film "Deep Throat" from the Theatre without a Search Warrant but on the basis of the reissued "Order of Seizure After Adversary Hearing" dated July 31, 1974.

XII

At approximately 3:35 P.M. on August 1, 1974, officers of the Buena Park Police Department seized a fifth print of the film "Deep Throat" from the Theatre without a Search Warrant but on the basis of the reissued "Order of Seizure After Adversary Hearing" dated July 31, 1974.

XIII

On August 2, 1974, the judge of the Superior Court again signed the document styled "Order for Seizure After Adversary Hearing," dating his signature "2 August 74." At approximately 5:10 P.M. on August 2, 1974, without a Search Warrant but on the basis of said document, officers of the Buena Park Police Department seized a sixth print of the film "Deep Throat" from the Theatre. At 8:00 P.M. on August 2, 1974, without a Search Warrant but on the basis of the same document, officers of the Buena Park Police Department seized a seventh print of the film "Deep Throat" from the Theatre.

XIV

On August 2, 1974, a document styled "Order of Seizure After Adversary Hearing" was signed by the judge of the Superior Court in connection with the

film "Devil in Miss Jones." At approximately 5:10 P.M. on August 2, 1974, without a Search Warrant but on the basis of said document, a third print of the film "Devil in Miss Jones" was seized from the Theatre. At approximately 8:00 P.M. on August 2, 1974, without a Search Warrant but on the basis of the same document, a fourth print of the film "Devil in Miss Jones" was seized from the Theatre.

XV

Any findings of fact contained in the Conclusions of Law are deemed incorporated herein.

CONCLUSIONS OF LAW

I

The only lawful and legitimate law enforcement purpose in seizing prints of films is to preserve one print for evidence in the trial of any criminal prosecutions arising out of the exhibition of said films. There is no lawful and legitimate governmental purpose in seizing more prints than are necessary for such criminal prosecutions. Motion picture films are presumed to be constitutionally protected until they are finally declared obscene after trial by jury. Prior to such final determinations of obscenity in a criminal prosecution, motion picture films are not contraband, and are not subject to seizure on sight. *Heller v. New York,* 413 U.S. 483, 93 S.Ct. 2789 (1973), *Roaden v. Kentucky,* 413 U.S. 496, 93 S.Ct. 2796 (1973), *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607 (1973), *Quantity of Copies of Books v. Kansas,* 378 U.S. 205, 84 S.Ct. 1723 (1964), and *Marcus v. Search Warrants of Property,* 367 U.S. 717, 81 S.Ct. 1708.

II

Where, as here, one print of a film is seized as evidence of an alleged violation of a state criminal obscenity law, it is a violation of the First and Fourteenth Amendments to the United States Constitution to attempt to suppress the continued exhibition of said film prior to the trial of said criminal charges by repeatedly seizing multiple prints of the same film. The pattern of seizures of multiple prints of the film "Deep Throat" and the film "Devil in Miss Jones" demonstrates Defendants' bad faith and harassment justifying federal intervention and injunction, since Defendants were bent upon a course of action that, regardless of the nature of any judicial proceeding, would effectively suppress the exhibition of the film "Deep Throat" and the film "Devil in Miss Jones" from Buena Park, California.

III

A Preliminary Injunction should issue pending further order of this Court, enjoining and restraining Defendants, their agents and employees and all persons in active concert and participation with them, from seizing any further copies of the film "Deep Throat" or the film "Devil in Miss Jones" from the Theatre.

IV

Any conclusions of law contained in the Findings of Fact are deemed incorporated herein.

DATED: ....., 1974.

/s/ WARREN J. FERGUSON
United States District Judge